93-962

NO.

Supreme Court, U.S.
FILED
DEC 17 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

RICHARD L. POPE, JR.
on behalf of himself and the class of all persons similarly situated,
Petitioners,

v.

UNIVERSITY OF WASHINGTON,
an instrumentality of the State of Washington,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

PHILLIP D. NOBLE*
KAREN J. VANDERLAAN
HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, Washington 98101
(206) 292-1144
Counsel for Petitioners

December 17, 1993

* *Counsel of Record*

QUESTIONS PRESENTED

1. Has the Supreme Court of Washington denied Petitioners equal protection of the laws under the Fourteenth Amendment by allowing Respondent, an instrumentality of the state, to improperly withhold earned wages under color of federal law from, and not refund such wages to, a large portion of its employees, where

   (a) the Respondent ceased wage withholding and provided wage refunds to other employees in exactly the same situation; and

   (b) as a result of the Supreme Court of Washington's decision, there has been a substantial difference in application of the law to similarly situated citizens without any rational basis?

2. Did the Supreme Court of Washington deny equal protection under the Fourteenth Amendment by ruling that the State of

Washington's wage collection statute, RCW 49.48.010, creates two classes of employees: terminated employees, who can seek recovery of wages improperly deducted by their employers, and non-terminated employees, who have no right to recover wrongfully withheld wages under the statute, where

(a) the purpose of the statute is to ensure that employees receive their full wages; and

(b) the distinction created by the Supreme Court of Washington is not rationally related to that purpose?

3. Did the Supreme Court of Washington deny Petitioners due process under the Fourteenth Amendment by ordering, *sua sponte*, summary judgment for the Respondent on issues neither raised, briefed, nor argued by the parties on appeal and

deciding factual issues without giving Petitioner an opportunity to be heard, where

(a) the court gave Petitioners no notice of its intent to rule on the issues it considered determinative;

(b) the court gave Petitioner no opportunity to be heard on those issues before the court decided them; and

(c) those issues presented factual questions which the court, *sua sponte*, decided against Petitioners without giving them an opportunity to present evidence?

4. Does federal law concerning social security and social security taxation (42 U.S.C. § 410, *et seq.*; 26 U.S.C. § 3101, *et seq.*), authorize or permit state employers to withhold wages for

social security contributions or taxes from public employees who are excluded from social security coverage? If not, did the Supreme Court of Washington misinterpret and improperly apply federal social security law by holding that the Respondent, an instrumentality of the State of Washington, was presumptively authorized to deduct wages for social security from its employees, even if those employees were excluded from social security coverage, unless expressly prohibited from doing so by contract or statute?

PARTIES TO THE PROCEEDINGS

Petitioners Richard L. Pope, Jr. and a class of present and former employees of the University of Washington similarly

situated[1] were plaintiffs and respondents in the Washington Supreme Court below.

The Respondent University of Washington ("University"), an agency or instrumentality of the State of Washington, was the defendant and appellant below.

---

[1] Richard L. Pope, Jr., a former University employee, commenced this action on his own behalf and on behalf of a class of employees employed by the University of Washington in job positions not eligible for coverage under a state retirement program at any time from March 14, 1983, to February 1, 1991, and from whose wages the University withheld social security contributions. *See* App. B-2. Although the exact number of class members was not determined prior to the Washington Supreme Court's decision, Respondent had estimated the class to include upwards of 30,000 employees or more.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS iv

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

A. Summary of Procedural Background 3

B. Respondent's Lack of Authority to Withhold Wages 5

C. Proceedings Below 16

REASONS FOR GRANTING THE WRIT . . . 23

A. The Washington Supreme Court's Decision Has Denied Petitioners Equal Protection of the Laws . 27

1. The Washington Supreme Court's Decision Condones And Perpetuates The University's Unequal Application Of The Law . . 29

2. The Washington Supreme Court's Decision Has Established Unequal Burden For

Petitioners To Recover For Breach Of Contract . . . 33

3. Washington Supreme Court's Construction of RCW 49.48.010 Creates Unequal And Irrational Distinctions Between Employees 38

B. Substantial Due Process Questions Are Raised By The Supreme Court of Washington's Entry, *Sua Sponte*, Of Summary Judgment For The University On Issues Never Briefed or Argued 43

C. The Washington Supreme Court Seriously Misinterpreted and Misapplied Federal Law by Concluding Petitioners Are Subject to FICA Taxes Regardless of Whether They Were Enrolled in Social Security 51

CONCLUSION 57

TABLE OF AUTHORITIES

CASES

Pope v. University of Washington, 121 Wn.2d 479, 852 P.2d 1055 (1993) 1, 19, 21, 22, 35, 47, 48, 52

Armstrong v. Manzo, 380 U.S. 545 (1965) 45

Board of Regents v. Roth, 408 U.S. 564 44

Bowen v. Public Agencies Opposed to Social Security Entrapment, 447 U.S. 41 (1986) 5, 6

Cameron v. Neon Sky, Inc., 41 Wash. App. 219, 703 P.2d 314 (1985) . 39

Celotex Corp v. Catrell, 477 U.S. 317 (1986) 50

DuPont v. Southern National Bank of Houston, Tex., 771 F.2d 874 (5th Cir. 1985), *cert. denied*, 475 U.S. 1085 45

Fountain v. Filsons, 336 U.S. 681 (1949) 50

Hatter v. United States, 953 F.2d 626 (Fed. Cir. 1992) 34

Haugen v. Central Lutheran Church, 58 Wn.2d 166, 361 P.2d 637 (1961) 33

Hillsborough v. Cromwell, 326 U.S. 620 (1946) 32

Hormel v. Helvering, 312 U.S. 552 (1941) 49

Ithaca College v. N.L.R.B., 623 F.2d 224 (2d Cir.), *cert. denied sub nom, Ithaca College Faculty Association NYSUT-AFT v. N.L.R.B.*, 449 U.S. 975 (1980) 50

Leary v. United States, 395 U.S. 6 (1969) 36

Logan v. Zimmerman, 455 U.S. 422 (1982) 28

Massachusetts v. Morash, 490 U.S. 107 (1989) 41

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). 44

Nordlinger v. Hahn, 505 U.S. ___, 120 L. Ed. 2d 1 (1992) 27, 28

Palmore v. Sidoti, 466 U.S. 429 (1984) 38

Perry v. Sindermann, 408 U.S. 593 (1972) 44

Pillatos v. Hyde, 11 Wn.2d 403, 119 P.2d 323 (1941) 41

Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984),

cert. granted and judgment vacated on other grounds, 471 U.S. 1113 (1985) 50

Saunders v. Shaw, 244 U.S. 317 (1917) 45

Shelley v. Craemer, 334 U.S. 1 (1947) 38

Smaby v. Shrauger, 9 Wn.2d 691, 115 P.2d 967 (1941) 41

Smith v. Cahoon, 283 U.S. 553 (1931) 27

Vlandis v. Kline, 412 U.S. 441 (1973) 36

Warner v. Channel Chemical Co., 121 Wash. 237, 208 P.2d 1104 (1922) 33

West coast Hotel Co. v. Parrish, 300 U.S. 379 (1936) 44

Zobel v. Williams, 457 U.S. 55 (1982) 28

STATUTES

26 U.S.C. § 3101, ... 2, 8, 54, 55

26 U.S.C. § 3111 54

26 U.S.C. § 3121 . . . . . 2, 8, 29, 54, 55, 56

28 U.S.C. § 1257(a) 2

42 U.S.C. § 410, ... 5, 53, 54

42 U.S.C. § 418 . . . . . 5, 6, 8, 53, 55,

42 U.S.C. § 3102(a) 54

United States Const. Amend. V . . 44

United States Const. Amend. XIV, § 1 2

RCW 41.48.030 7

RCW 41.48.040 . . . . . 9, 56

RCW 49.48.010 . . . . . 2, 4, 17, 18, 21, 22, 38, 41, 42, 43, 47, 48

RCW 49.52.050 . . . . . 17, 22

RCW 49.52.070 . . . . . 17, 18

MISCELLANEOUS

26 C.F.R. § 31.6413(a)-1(b)(1)(i) (1990) 15

1 Social Security Law and Practice, Sec. 4:37 (1987) 6

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner Richard L. Pope, Jr., on behalf of himself and a class of similarly situated employees, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Washington entered as modified on September 21, 1993.

OPINIONS BELOW

An initial decision of the Supreme Court of Washington was issued May 20, 1993. (Reported at 121 Wn.2d 479, 852 P.2d 1055 (1993) (*see* Appendix A.) Petitioner timely moved for reconsideration (*see* Appendix C), which was granted (*see* Appendix D). On September 21, 1993, the opinion was modified (*see* Appendix E). The Mandate of the Supreme Court of Washington issued on October 13, 1993 (*see*

Appendix F.) The decision was an appeal from a judgment of the Washington Superior Court for King County, which was based on Findings of Fact and Conclusions of Law entered December 5, 1991 (*see* Appendix B).

JURISDICTION

This Court has jurisdiction to review the judgment of the Supreme Court of Washington by writ of certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provisions and federal and state statutes (relevant portions reproduced in Appendix G):

-- U.S. Const. Amend. XIV, § 1

-- 26 U.S.C. § 3101

-- 26 U.S.C. § 3121(a) and (b)(7)

-- 42 U.S.C. § 410(a)(7), § 418

-- Revised Code of Washington (RCW) 41.48.040

-- Revised Code of Washington (RCW) 49.48.010

STATEMENT OF THE CASE

A. Summary of Procedural Background.

This action was commenced by Richard L. Pope, Jr. for himself and a class[2] of similarly situated employees of the University of Washington to recover wages the University had wrongfully, and without right or authority, withheld from them as social security contributions.[3] Petitioners were not subject to social security withholding. The University, despite knowing that Petitioners were within a class of employees exempt from social security, deducted wages from them anyway. Petitioners alleged that this wrongful taking of their wages was a breach of

---

[2] *See* footnote 1, *supra*.

[3] For example, a class employee earning $20,000 per year lost $1,212 in 1988 due to the University's improper wage deductions.

their employment contract (*i.e.*, the University failed to pay the full wage promised) and Washington's wage payment statute (RCW 49.48.010).

The trial court certified the class and granted Petitioners' motion for summary judgment on their liability claims. At a subsequent trial on relief the University requested the trial court to reconsider its liability rulings. The trial court reaffirmed its rulings, entered Findings of Fact and Conclusions of Law, and granted relief accordingly. (App. B)

The University appealed. The Washington Supreme Court reversed the liability findings. In an apparent effort to protect the state treasury and a state institution from its own errors, the Washington court entered a decision which denied Petitioners their constitutional rights of due process and equal protection under the

Fourteenth Amendment and incorrectly interpreted and applied federal law regarding social security taxation of public employees.

B. Respondent's Lack of Authority to Withhold Wages.

As originally enacted, the 1935 Social Security Act excluded state employees. Amendments in 1950 allowed states to enroll public employees on a voluntary basis. Social Security Act Amendments of 1950, Pub. L. No. 81-734 § 210 (codified as 42 U.S.C. § 410(a)(7)(A)). These amendments permitted states to enter into formal agreements with the federal government to extend social security coverage to designated groups of employees of the state or its political subdivisions. *Id.*, § 218 (codified as 42 U.S.C. § 418).[4]

---

[4] This Court explained the history of section 418 in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 447 U.S. 41, 44-45 (1986).

This extension of coverage, however, did not include public employees covered by a retirement program. *Id.* In 1954 the Act was amended again to allow coverage of employees covered by a retirement program. Social Security Amendments of 1954, Pub. L. 83-761, § 101 (codified as 42 U.S.C. § 418(d)).

States and their subdivisions enroll their employees in social security through their agreement with the federal government in "coverage groups" rather than employee by employee. There were two basic coverage groups: (1) "absolute coverage groups" which consist of employees in positions not covered by a state retirement plan, and (2) "retirement system coverage groups" consisting of employees in positions which are covered by a state retirement plan. 1 Social Security Law and Practice, Sec. 4:37 (1987).

The Washington Legislature authorized the Governor to enter into an agreement with the federal government to extend social security to public employees. RCW 41.48.030. This agreement, called the "Basic Agreement", was entered into in 1951 on behalf of the state and certain instrumentalities and subdivisions listed in an appendix to the Basic Agreement. The University was not included.

In 1955 the University separately applied and was added to the Basic Agreement. The University's coverage group was limited to employees covered by its retirement program, the Teachers' Insurance and Annuity Association Retirement System (TIAA). In 1957 the Basic Agreement was modified to extend social security to employees, including specifically University employees, covered by the state retirement system, the Public Employees Retirement System (PERS). Thus, social

security coverage at the University was a "retirement system coverage group" (*i.e.*, only University employees covered by a retirement plan were subject to social security).

Social Security is financed, in part, by taxes imposed on employees under the Federal Insurance Contributions Act ("FICA"). 26 U.S.C. § 3101(a). Federal law specifically exempted state employees from this FICA tax unless they were included in an agreement authorized by section 218 of the Social Security Act (42 U.S.C. § 418). 26 U.S.C. § 3121(b)(7).

The Washington statute authorizing social security coverage for public employees provided that employees "whose services are covered by an agreement" (*i.e.*, the Basic Agreement as modified) were required to contribute wages for coverage "equal to the amount of employee tax [imposed by

FICA] if such services constituted employment within the meaning of [FICA]." RCW 41.48.040(1). If applicable, this contribution was to be collected by the employing agency from wages when paid. RCW 41.48.040(2). However, as the trial court found and not challenged by the University, if the employee was not covered by the Basic Agreement, then his or her services were not "employment" subject to social security and the employer had no right to deduct wages for that purpose. (App. B 7-8)

In the late 1970s a dispute arose between the Social Security Administration (SSA) and the University as to whether certain employees were subject to social security withholding. The University, with assistance from the State Employment Security Department (EMS, the state agency responsible for administering OASDI) and the state Attorney General's office,

"thoroughly investigated" the Basic Agreement and proved it extended coverage only to employees eligible to participate in a state retirement program (i.e., it provided for "retirement system coverage groups"). In 1981 the SSA concurred, concluding that "it is our determination that the Washington Agreement does not extend coverage to state employees as members of an absolute coverage group."[5] The trial court found (App. B 10):

> In June 1981, the federal Social Security Administration and the Washington State Employment Security Department, after considering the materials submitted by defendant, agreed with defendant that the Basic Agreement did not extend social security coverage to all state employees as an absolute coverage group but instead extended coverage on a retirement program eligibility group basis. As of June 1981, all relevant parties to the Basic Agreement, i.e. the federal government, the State of Wash-

---

[5] Letter, U.S. Dept. of Health & Human Services to Washington's OASI Administrator, June 11, 1981 (Trial Ex. 2).

> ington, and the University of Washington, agreed that only those state employees who were in job positions eligible to participate in a state retirement program, namely, either TIAA or PERS, were covered by and subject to social security.

In 1983 the EMS advised all state agencies, including the University, that the Basic Agreement provided "'retirement' system coverage rather than 'absolute' coverage" and that only "positions that are eligible for retirement system coverage are included for social security purposes." (App. B 11) State employing agencies were directed to identify retirement-ineligible employee positions so that social security withholding could be stopped and refunds or credits provided to affected employees. Rather than complying with the directive to identify "all" such employees, the University limited its selection to research and teaching assistant employees (RA/TAs). (App. B 13-14)

The University's controller explained that the University limited its selection "pure and simple as a desire to increase the take-home pay of the TAs and RAs." (App J)

After some initial confusion as to whether RA/TAs were retirement-system eligible, the SSA in 1987 agreed that the RA/TAs were not eligible and thus were not subject to withholding. The University immediately stopped wage withholding for RA/TAs and undertook an aggressive campaign of locating and contacting present and former RA/TAs to refund previously withheld wages back to 1980.[6] (App. B 15-16).

Although it provided wage withholding relief for the RA/TA employees, the University chose not to provide such relief to other employees (*i.e.*, Petitioners) who

---

[6] Over $6 million was refunded to over 7,000 RA/TAs.

were in exactly the same situation (*i.e.*, not eligible for a state retirement plan and hence not subject to social security withholding).[7] The trial court found:

> Defendant knew that plaintiff and other employees were employed by defendant in job positions which were not covered by a state retirement program. Under the Basic Agreement as understood and followed by defendant, plaintiff and such other employees were not covered by the Basic Agreement and not subject to social security. Despite the knowledge that plaintiff and other employees were not in job positions eligible to participate in a retirement program, defendant withheld wages from these employees for social security. [App. B 22]

For example, in 1987, just after the SSA agreed that RA/TAs were not subject to withholding, University officials, in

---

[7] The proof showed that "at that time there were other job positions which were likewise not eligible under any of the state's retirement systems and not subject to social security, but which were not listed or identified by defendant. Rather than discontinue withholding of the wages of the employees in these other job positions, the University continued, and intended to continue, to withhold wages from those employees for social security." App. B 13-14.

discussing wage refunds, recognized that there were "other similar groups" who were also "in the non-retirement group" but chose not to stop withholding or to provide wage refunds for them. (Appendix K) The University's Vice President testified that relief was not pursued for Petitioners because there was "no champion for that effort as there had been in the case of the RAs and TAs." (Appendix L)

Mr. Pope was employed in a non-retirement eligible position and questioned the University's right to take his wages. The University eventually acknowledged that 52 job positions were not subject to withholding and stopped withholding for 32 of them (including Mr. Pope's) in January, 1990. (App. B 18) The University did not, however, stop its practice of withholding from all ineligible employees.

In stark contrast to the RA/TAs, the University did not provide wage refunds

for the employees from whom it admittedly withheld wages for over seven years without right or authority.[8] In 1990 the University decided it would assist employees who inquired about obtaining refunds from the IRS, but it also adopted a policy not to advise present or former employees about the refund potential. (App. B 20-22). The IRS told the University that the IRS would not accept individual employee requests and that the University, as the employer, was responsible for providing refunds to the affected employees.[9] The University thereafter refunded almost

---

[8] At trial Respondent's counsel conceded to the trial court that the University's withholding of wages from Petitioners was "legally erroneous" and that "social security should not have been withheld at the time that it was." (App. C 8 fn 3)

[9] Under the applicable IRS regulation, the employer has the responsibility for refunding the wages it improperly took from employees: "If an employer collects from any employees and pays to the district director more than the correct amount of the employee tax under [FICA] . . . the employer shall repay or reimburse the employee in the amount thereof[.]" 26 CFR § 31.6413(a)-1(b)(1)(i) (1990) (emphasis added).

$1,750,000 to 680 non-RA/TA employees. In March, 1991, the University stopped this effort and refused to provide refunds for the balance of Petitioners.

The result has been that the University allowed some employees to keep all of their wages and provided them wage refunds for wrongfully withheld wages from previous years, but continued to withhold wages from other, similarly situated employees without right, authority, or rational justification, and did not provide them with wage refunds.

C. Proceedings Below.

Because the University refused to refund to him and other affected employees the wages it wrongfully withheld, and because it refused to stop withholding from all affected employees, Mr. Pope commenced this class action to recover the amounts wrongfully withheld. Petitioners alleged,

inter alia, (1) that the employer's failure to pay the full wage promised by withholding part of the wage owed without right or authority constituted a breach of contract, and (2) the employer's wrongful withholding was a breach of Washington's wage statute, RCW 49.48.010. That statute declared it "unlawful for any employer to withhold or divert any portion of an employee's wages unless the deduction is (1) required by state or federal law, or (2) specifically agreed upon [by the employee]." Petitioners also claimed punitive damages under a Washington statute which allows double damages if wages are withheld "willfully and with intent to deprive the employee of any part of his wages." RCW 49.52.050, .070.

The trial court granted Petitioners' motion for summary judgment on liability, finding that the University breached its

employment contract with Petitioner and violated RCW 49.48.010. The trial court subsequently held that the University breached RCW 49.52.070 and awarded judgment accordingly. (App. B)

On direct appeal to the Washington Supreme Court the judgment was reversed. *Pope v. University of Washington, supra.* Although acknowledging that the employer/employee relationship was contractual, the Washington Supreme Court, *sua sponte*, created new contract law which placed new and unique burdens on Petitioners to recover their wages. The court first held that before Petitioners could recover damages for breach of contract they had to prove there was a specific contract term prohibiting social security withholding. Thus, the court imposed upon Petitioners the burden of proving a contract term "obligating the University to refrain"

from doing what it had no legal right to do in the first place (*i.e.*, withhold wages). 121 Wn.2d at 488, 852 P.2d at 1060. (App. A 18) Absent such proof Petitioners could not recover for breach of contract. Rather than remanding to allow Petitioners to present evidence to meet this new and unique requirement, the court found as a fact that there could be no such proof and directed summary judgment for Respondent. On reconsideration the court implicitly recognized the unusual burden it had created for employees trying to recover their wages. It stated that its new breach of contract requirement applied only to Petitioners, because they were seeking wages wrongfully withheld for social security:

> We do not suggest that an employer breaches an employment contract only when he or she violates an express term of the contract; instead, we merely assume an employment contract

> authorizes the deduction of Social Security withholding in good faith unless the contract or an implied statutory term specifies otherwise. If an employer made deductions from an employee's wages due to dissatisfaction with the employee's work, for example, it would generally be unnecessary for the employee to show an express contract term prohibiting such deductions.

App. E (emphasis added).

The court left unmentioned the fact that Petitioners were statutorily exempt from social security withholding. Thus the court required Petitioners to prove there was some contractual term prohibiting their employer from withholding wages for social security even when the University acted without authority and contrary to law when it withheld wages from Petitioners. In doing so the court denied Petitioners a remedy on their right to be paid the full wage for which they contracted, and did so without giving them prior notice or a hearing on this issue.

The court also held that the wage statute, RCW 49.48.010, could be considered an implied term of the contract. The court, *sua sponte*, however, held that this statute applied only to wages which were due and owing at the time the employee terminated his or her position. 121 Wn.2d at 489, 852 P.2d at 1061 (App. A 20-21). The court then concluded, erroneously and without an opportunity for argument or proof from Petitioners, that Petitioners' claims did not include wages due at the termination of employment, and thus the statute was inapplicable. Again, based upon its unilateral finding of fact, the Washington Supreme Court granted summary judgment to the University rather than remanding for further findings in the trial court.[10]

---

[10] The Washington Supreme Court also re-weighed the facts and found that the withholding of wages from Petitioners was not done "willfully and with intent to deprive" them of wages within the meaning

After this decision Petitioners asked the trial court to redefine the class to create a subclass of terminated employees seeking recovery of wages due and owing at time of termination. A substantial portion of the class, including Mr. Pope himself, were such terminated employees. This was done to bring the case into compliance with the Washington Supreme Court's new limitation on this statute. The trial court granted the motion (*see* Appendix H). Upon motion from the University, the Washington Supreme Court quashed the trial court's order, without opinion and without argument. (*See* Appendix I.) Thus the Washington Supreme Court again denied Petitioners a remedy for a right (*i.e.*, to recover under RCW 49.48.010) which the court itself had defined.

---

of RCW 49.52.050, and hence there was no violation of that statute either. 121 Wn.2d at 490, 852 P.2d at 1061.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Washington explicitly approved arbitrary distinctions in the application of statutory and common law, thereby depriving Petitioners of their equal protection rights under the Fourteenth Amendment. The court's decision raises substantial questions regarding the state's ability to create arbitrary and irrational distinctions between similarly situated state employees in at least three respects:

(1) The University, as a state institution, has been allowed to treat similarly positioned employees in a starkly different manner in terms of withholding and paying wages. It has been allowed to arbitrarily pick and choose, at its whim, which employees are entitled to full wages and to disregard the rest.

(2) The court's decision has created special and irrational burdens of proof that Petitioners must meet in order to prove their employment contract was breached; burdens that no other employee or contracting party has been required to prove. In doing so the Washington court has established subclasses of em-

ployee litigants who are subject to different treatment in the courts.

(3) By construing the State of Washington's wage collection statute as creating distinct classes of terminated employees and non-terminated employees, and allowing only the former to recover wages wrongfully withheld, the Washington Supreme Court has applied the statute in a way which treats similarly placed employees in different ways -- providing relief for some and not for others. It then compounded this unequal treatment by not applying its own newly defined requirements to Petitioners, granting summary judgment for the University even though Mr. Pope and others met the court's criteria.

The court's disparate treatment does not further or support any justifiable, rational state policy. To the contrary, these rulings are irrational, and can be explained only as a means of excusing a state agency from liability.

The Washington Supreme Court's decision also raises substantial questions about the power of state appellate courts to deprive litigants of procedural due process as guaranteed by the Fourteenth

Amendment. The Petitioners respectfully submit that the Washington court, by determining facts and granting summary judgment *sua sponte* to Respondent on the basis of issues not raised by the parties and without notice to the parties of its intent to consider those issues, denied the Petitioners their fundamental right to a day in court. By unexpectedly reinterpreting state law in such a way as to create new fact issues on which evidence had never been presented, failing to remand the case for further rulings by the trial court, and granting summary judgment for the University instead, the court denied Petitioners procedural due process. It deprived them of an opportunity to submit evidence showing why judgment should not be entered against them. The result has been a taking of Petitioners'

property (i.e., their earned wages) without due process of law.

Finally, the Washington Supreme Court incorrectly interpreted and applied federal law regarding social security. Federal law expressly excluded public employees from social security (and wage withholding) unless they were covered by an agreement between the state and the federal government. Petitioners were not covered under the agreement between the State of Washington and the federal government, and hence were not subject to withholding. The court incorrectly applied federal law by assuming, contrary to the federal statutory scheme, that Petitioners were subject to social security taxes. In doing so the court has allowed the University to take property of Petitioners under color of law when, in fact, the legal authority to take those wages did not exist.

Through its application of federal law the court has denied Petitioners a remedy to recover their wages.

A. The Washington Supreme Court's Decision Has Denied Petitioners Equal Protection of the Laws.

The Fourteenth Amendment commands that no person is to be denied equal protection of the law by any state. Citizens can be grouped and classified for different treatment under law if the classification is rational and bears some relationship to a legitimate governmental purpose. The equal protection clause requires, however, that similarly situated persons be treated equally and similarly. *Nordlinger v. Haber*, 505 U.S. ___, 112 ___ 236, 120 L. Ed. 2d 1, 12 (1992) (it "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."). *See Smith v. Cahoon*, 283 U.S. 553, 566 (1931) ("[T]he constitu-

tional guaranty of equal protection of the laws is interposed against discrimination that is entirely arbitrary."). *Cf. Logan v. Zimmerman*, 455 U.S. 422, 442 (1982) (Blackmun, J., concurring (equal protection applies where state draws "an arbitrary line between otherwise identical claims.")).

Where state action has classified citizens for different treatment, it will not survive equal protection scrutiny unless, at minimum, "the distinction it makes rationally furthers a legitimate state purpose." *Zobel v. Williams*, 457 U.S. 55, 60 (1982); *Nordlinger*, 120 L. Ed. 2d at 12.

Under the Washington Supreme Court's decision artificial classifications have been created among employees who are in exactly the same situation. The result is that persons in like circumstances are

treated substantially differently, such that Petitioners have been denied their full wages while other, similarly placed employees have received all of their earnings.

1. The Washington Supreme Court's Decision Condones And Perpetuates The University's Unequal Application Of The Law.

Applicable federal law clearly provides that only employees covered by social security (*i.e.*, within the Basic Agreement) are subject to wage withholding under FICA. 26 U.S.C. § 3121(b)(7)(E) (1989). The statute neither specifies nor allows for differing classes of non-covered employees for purposes of withholding under FICA. All state employees not covered by the Basic Agreement are exempt from social security withholding.

The University, however, created impermissible classes of non-covered employees and applied the law unequally to those

groups. Out of the total population of exempt employees, the University artificially created a subgroup of research and teaching assistants (RA/TAs) whom it decided should have the benefits of full take-home pay. It correctly applied the law to them by exempting them from wage withholding and refunding their previously withheld wages.[11]

The University treated the balance of exempt employees (*i.e.*, Petitioners) in a starkly different manner. Instead of ceasing withholding for them, the University continued to withhold their wages.[12] The University applied the law authorizing wage withholding differently and unequally to Petitioners.

---

[11] Similarly, the University corrected its admitted error by providing for wage refunds for a small number of non RA/TA employees in 1991.

[12] The trial court found that this difference in treatment was purposeful and not accidental. App. B 16-22.

There is no rational basis for this different treatment, nor is any state or public purpose achieved or fostered. This disparate treatment was arbitrary and irrational, undertaken solely because the University wanted RA/TAs to have more "take-home pay" and because there was "no champion" for Petitioners. There is no justifiable purpose in allowing a state agency to choose arbitrarily which employees should receive full wages and which not when all affected employees are owed and entitled to their full wage. In conceding that it was "legally erroneous" for it to have withheld wages from Petitioners, and stopping withholding from some employees in 1990, the University essentially acknowledged it had applied the wage withholding laws differently to Petitioners.

This unequal imposition of wage withholding for FICA taxes unquestionably

violates the equal protection clause. "The equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946).

The Washington Supreme Court's decision condones this unequal treatment under the law. The decision allows the University to ignore the statutory law and treat similarly situated employees unequally. In their Motion for Reconsideration Petitioners raised this issue (App. C), but the court ignored this constitutional problem. The Washington court's perpetuation of the University's unequal treatment under the law must be reviewed.

2. The Washington Supreme Court's Decision Has Established Unequal Burden For Petitioners To Recover For Breach Of Contract.

Under Washington law the relationship between employer and employee is contractual in nature. *Haugen v. Central Lutheran Church*, 58 Wn.2d 166, 168, 361 P.2d 637 (1961). Where the employer offers a wage in return for work and the employee fully performs, the employer becomes obligated to pay the full amount offered. It is axiomatic that where an employer improperly reduces the wage paid the employee has "a right to . . . treat that act as a breach of the [employment] contract." *Warner v. Channel Chemical Co.*, 121 Wash. 237, 244, 208 P.2d 1104 (1922).

While the amount paid under an employment contract may be reduced if the employee agrees or if authorized by law, neither of those conditions apply to Petitioners. Petitioners were not subject to

wage withholding nor did they agree to the unauthorized withholding of their wages. When the University withheld wages for social security without right or authority, it breached the employment contract[13] and Petitioners could sue to recover damages. *Hatter v. United States*, 953 F.2d 626 (Fed. Cir. 1992) (U.S. district court judges could sue for breach of contract and damages to recover social security taxes improperly withheld from their wages; claim was not for a tax refund).

The Washington Supreme Court, however, imposed a new and unique burden on Petitioners to meet to establish their claim for breach of contract. In addition to proving that the contract was breached because the University paid less than what was owed, the court required, for these

---

[13] As the trial court observed, "I'm being perhaps simplistic, but the contract was to pay them monies, and monies weren't paid is a breach." RP 64; *see* App. B 29, Concl. of Law 4.

employees only, a showing that their employment contract contained a term prohibiting their employer from taking unauthorized deductions.[14] Thus, for Petitioners to recover their wrongfully withheld wages they must prove that there was an express[15] contract term requiring their employer to refrain from doing what it had no right or authority to do in the first place.

Such an additional burden is superfluous and irrational. No other contractual relation exists where one must, in order

---

[14] Even though Petitioners were not covered by the Basic Agreement, the court said that unless they also showed a contractual term prohibiting social security withholding unless authorized, their "breach of contract claim must fail." (App. A 17-18). The court concluded: "The issue, then, is whether the employment contracts contained a term obligating the University to refrain from withholding Social Security from the gross wage unless authorized. The class did not present any evidence that such a contract term was contained, expressly or by implication, in the employment contracts." 121 Wn.2d at 488, 852 P.2d at 1060; App. A 18.

[15] The term must be express, since the court would not imply a promise not to pay less than what was contracted. This, of course, is contrary to basic contract law that one is obligated to perform (*i.e.*, pay) as promised unless excused.

to recover for breach, affirmatively prove a separate, independent contractual term obligating a party to refrain from doing what that party had no authority to do. On reconsideration the Washington court stated that other employees seeking wages due to breach of contract need not show an express contract term prohibiting deductions. For Petitioners, however, the court "assumed" (contrary to federal statute)[16] the deductions were authorized and placed on Petitioners the extra burden of proving a discrete contractual term specifying otherwise.[17] App. E.

---

[16] Presumptions such as this are disfavored on due process grounds. *Vlandis v. Kline*, 412 U.S. 441, 446 (1973); *Leary v. United States*, 395 U.S. 6, 29-53 (1969).

[17] Such a burden would be difficult, if not impossible, to meet in any practical sense since an employee would not normally or reasonably require an employer to expressly agree not to withhold social security where the employee was not subject to social security in the first place. This would simply be stating the obvious. The difficulty in meeting this new test is especially true for Petitioners since the need for this new term did not arise until this decision, and hence would not have been apparent when the contracts were made.

No rational state interest or purpose exists which would justify treating Petitioners differently from other claimants suing to recover what is owed due to breach of contract.[18] Whereas other employees can recover for breach of contract simply by showing that the employer paid less than what was contractually owed, Petitioners have been saddled with the additional (and impossible) burden of affirmatively showing a contractual term prohibiting the employer from taking wrongful deductions. No common law principle or state policy is cited as to why it is proper to impose this additional

---

[18] This unique and unexplainable burden creates an anomalous situation. One party may pay less than what is owed under a contract but never has to pay the full amount owed because there is no separate contractual term obligating that party not to wrongfully pay less. Here the University has admitted that it was "legally erroneous" for it to have withheld wages from Petitioners, but because the Washington Supreme Court's decision states there was no separate contractual term prohibiting such "legally erroneous" deductions, and hence no breach of contract, the University is not required to correct its error. Petitioners are still without their earned wages.

burden on Petitioners where it is not applied to others and lacks any rational justification.

Decisions by state courts have long been treated as state action for equal protection purposes. *Palmore v. Sidoti*, 466 U.S. 429, 432 n.1 (1984); *Shelley v. Kraemer*, 334 U.S. 1 (1947). The Washington Supreme Court has denied equal treatment to Petitioners by establishing legal barriers to their breach of contract claim that are irrational and not justified by any state policy or legal principle. This denial of equal protection rights must be reviewed.

3. Washington Supreme Court's Construction of RCW 49.48.010 Creates Unequal And Irrational Distinctions Between Employees.

RCW 49.48.010 provides employees statutory protection from employers who, without right, "withhold or divert any portion of an employee's wages." (App. G) The

Washington Supreme Court recognized that this statute is impliedly a term of an employment contract, thereby making a violation of this statute another basis for claiming breach of contract.

The Washington Supreme Court's decision, however, created a distinction between terminated and non-terminated employees which does not explicitly appear on the face of the statute. Other provisions of the statute refer to an "employer or former employer" and to "employees and former employees", thereby indicating an intent to cover existing as well as terminated employment relationships. The statute has been interpreted as making "it unlawful for an employer to withhold or divert <u>any portion</u> of an employee's wages except in three limited circumstances" (emphasis added) and encompassing an "employee or former employee". *Cameron v. Neon Sky,*

Inc., 41 Wash. App. 219, 223, 703 P.2d 314, (1985).

However, the court arbitrarily limited the protection of the statute to terminated employees only. The decision denies, without reason, this statutory protection to employees whose wages were wrongfully withheld or diverted while they continue working. This ruling, coupled with the decision's insupportable conclusion that an employee cannot sue for breach of contract to recover wages withheld for social security absent an express contractual term prohibiting unauthorized deductions, effectively denies Petitioners a remedy to recover their wrongfully withheld wages.

No valid state interest is rationally served by the distinction drawn by the Washington court between terminated and non-terminated employees. On the con-

trary, the remedial purpose of RCW 49.48.010 to protect employees by ensuring that they receive their full wages[19] is actually undermined by the court's denial of any remedy to current employees. Under the Supreme Court of Washington's decision, non-terminated employees must quit their jobs in order to recover wages due -- a high and irrational price to charge for this statutory protection.

In the present case, the Supreme Court of Washington has read into Washington's wage collection statute an arbitrary and irrational distinction between terminated and non-terminated employees. The former are allowed to bring claims for recovery of wages improperly withheld by their

---

[19] *See Pillatos v. Hyde*, 11 Wn.2d 403, 407, 119 P.2d 323 (1941) (statutory predecessor to RCW 49.48.010 "declares a rule of public policy in this state designed to protect wage earners in certain industries"); *Smaby v. Shrauger*, 9 Wn.2d 691, 115 P.2d 967, 970 (1941) (same). *See also Massachusetts v. Morash*, 490 U.S. 107, 119 (1989) (recognizing that state legislation regulating payment of wages functions to protect employees).

employers, whereas the latter are not. The court's reading of two separate classes of employees into RCW 49.48.010 does not rationally advance the statute's objective of ensuring that all employees receive their full wages. This judicially interpreted statutory classification scheme should be struck down as a denial of equal protection under the Fourteenth Amendment. Although this issue was raised in Petitioners' Motion for Reconsideration (App. C), the court did not deal with it.

The Washington court further denied Petitioners equal application of the laws by refusing to let its own, new legal standard be applied to Petitioners. A substantial portion of the employee class (including Mr. Pope) are terminated employees who were claiming wages due and owing at termination. At Petitioners' request, the trial court created a subclass of terminated employees who, under

the Washington Supreme Court's decision, would still have a right to recover under RCW 49.48.010. (App. H) Without opinion and without oral argument, the Washington Supreme Court quashed the trial court's order. (App. I) Thus it has applied its own judicially created law unequally by denying its application to Petitioners. There is no rational basis for this denial, which results in Petitioners being treated differently than other employees by being excluded from the statute's protection altogether. This blatant denial of Petitioners' equal protection rights must be reviewed.

B. Substantial Due Process Questions Are Raised By The Supreme Court of Washington's Entry, *Sua Sponte*, Of Summary Judgment For The University On Issues Never Briefed or Argued.

By raising new issues *sua sponte*, declaring them to be dispositive, deciding them without notice to or argument from

the affected parties, making factual findings, and granting summary judgment without giving the opposing party an opportunity to submit contrary evidence, the Washington court violated the basic underpinnings of procedural due process under the Fourteenth Amendment.[20]

Procedural due process requires, at minimum, notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.

---

[20] Through the acts of the University (a state instrumentality) and the state court, Petitioners have been denied their property; namely, their money in the form of earned wages. They have also been denied their contract right to those wages. Absent appropriate exercise of police power by the state, contract rights are entitled to due process protection from arbitrary state action. *E.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1936). Federal and state statutes concerning social security and wage withholding provided Petitioners an entitlement to their contractual wages without having deductions taken by the state, an entitlement subject to due process protection. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). Because Petitioners' contract right to their wages has been impaired due to application of federal and state statutes, the prohibitions of the Fifth Amendment (U.S. Const. Amend. V) and Article I section 10 of the Constitution are also violated.

306, 314-15 (1950) (notice); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (opportunity to be heard). The decision of the Supreme Court of Washington to enter summary judgment, *sua sponte*, for the University on issues not raised, briefed or argued on appeal, without advance notice to the Petitioners and without any "proper opportunity to present . . . evidence" material to that issue, violates the constitutional guarantee of due process contained in the Fourteenth Amendment. *Saunders v. Shaw*, 244 U.S. 317, 319 (1917).[21] Not only were Petitioners denied notice and an opportunity to be heard on the issues that the Washington Supreme Court deemed dispositive, but they were also denied an opportunity to show facts

---

[21] *See also DuPont v. Southern Nat. Bank of Houston, Tex.*, 771 F.2d 874, 880-81 (5th Cir. 1985), *cert. denied*, 475 U.S. 1085 (district court's rendering of partial summary judgment for plaintiff on issue of whether property transfers were valid violated Due Process Clause, where defendants were denied opportunity to present evidence as to validity of transfers).

which would preclude entry of summary judgment for the University on the newly stated issues.

The Washington Supreme Court denied Petitioners due process in two respects. First, on the breach of contract claim, the court, as described above, rewrote basic contract law by creating a new evidentiary requirement: that Petitioner had to show that a term in the contract prohibited the University from withholding wages for social security from employees not covered by social security. This was not an issue raised by the University on appeal. Instead, the issue was raised on the court's own initiative after briefing and argument, and without notice to or opportunity to hear from Petitioners. Secondly, not only did the court raise and rule on the legal issue, but it unilaterally determined the facts concerning that issue. It concluded that because Peti-

tioners did not present evidence supporting the existence of such a term[22] (121 Wn.2d at 488, 852 P.2d at 1060; App. A 18), such a term must not exist and thus summary judgment was granted to the University. Once the issue had been identified, Petitioners were denied the opportunity to present evidence to show that summary judgment for the University was inappropriate.

The same is true as to the statutory issue. First the Washington Supreme Court, again *sua sponte* and without notice or opportunity to be heard, redefined the scope of the wage statute, RCW 49.48.010. The scope of this statute had never been

---

[22] Petitioners submitted no evidence on this issue because the trial court did not find such proof to be a legal prerequisite to a breach of contract claim. Moreover, since the issue was considered by the appellate court without notice, Petitioners had no opportunity to identify evidence already in the record which would show, at least implicitly, that the parties did not intend that the University could take legally unauthorized deductions.

raised or argued by the University. Thus the court, without hearing from Petitioners, peremptorily narrowed RCW 49.48.010 by holding it provided relief only for terminated employees. Secondly, the court compounded the error by making factual conclusions concerning Petitioners' claims (again without hearing from Petitioners). It erroneously found that Petitioners' claims factually did not include wages due at termination[23] (121 Wn.2d at 489, 852 P.2d at 1061; App. A 21), and, again, granted summary judgment for the University on this claim without giving Petitioners an opportunity to submit contrary evidence.

This Court has made clear that such procedures are improper:

---

[23] This factual conclusion was contrary to fact. The class did include terminated employees (including Mr. Pope) and their claim did include wages due and withheld at time of termination. *See* App. C. Such a factual showing to the trial court would have precluded entry of summary judgment for the University.

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Hormel v. Helvering, 312 U.S. 552, 556 (1941). Similarly, it has been held:

> When the parties have not even been notified that an issue will be considered by the court at the only point when they may submit factual affidavits -- the trial level -- then there is every likelihood that they have been denied the full opportunity to present the applicable facts. Unless the new issue uncovered by the appellate court was one which was clearly framed by the proceedings below so that the parties had a legitimate chance to submit all relevant materials and argue their implications, it is clearly unjust for the appel-

> late court to direct the issuance of summary judgment on a new issue raised *sua sponte* on appeal.

Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1537 (D.C. Cir. 1984), *cert. granted and judgment vacated on other grounds*, 471 U.S. 1113 (1985). *See Ithaca College v. N.L.R.B.*, 623 F.2d 224, 229 (2d Cir.), *cert. denied sub nom, Ithaca College Faculty Ass'n NYSUT-AFT v. N.L.R.B.*, 449 U.S. 975 (1980).

This Court has expressly held that it is error for a court to entry summary judgment against a party *sua sponte* unless "the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp v. Catrell*, 477 U.S. 317, 326 (1986). *See Fountain v. Filsons*, 336 U.S. 681, 683 (1949) (it is error to grant summary judgment *sua sponte* if party against whom judgment is entered has not

had "an opportunity to dispute the facts material to that claim.").

Here Petitioners have been denied both the right to address the correctness of the new substantive contract and statutory law defined by the Washington Supreme Court and the right to present evidence to how their claims survive this new law and that the opposing party is not entitled to summary judgment. Although this constitutional error was presented to the Washington court (App. C), it was ignored. Petitioners have been effectively denied their opportunity to be heard and to defend their substantive rights. Their denial of due process must be reviewed.

C. The Washington Supreme Court Seriously Misinterpreted and Misapplied Federal Law by Concluding Petitioners Are Subject to FICA Taxes Regardless of Whether They Were Enrolled in Social Security.

The Supreme Court of Washington's decision includes the novel theory that the

University had no implied contractual obligation to the Petitioners to pay the amount of wages promised because their employment contracts contained no term "obligating the University to refrain from withholding Social Security from the gross wage unless authorized." 121 Wn.2d at 488, 852 P.2d at 1060; App. A 18. On reconsideration the Washington court amended its opinion to state that:

> We do not suggest that an employer breaches an employment contract only when he or she violates an express term of the contract; instead, we merely assume an employment contract authorizes the deduction of Social Security withholding in good faith unless the contract or an implied statutory term specifies otherwise. [App. E (emphasis added)].

The crux of the court's reasoning, which permeates its decision and provides the basis for its peculiar treatment of Petitioner's claims, is the conclusion that federal law regarding social security

and FICA taxes authorizes wage withholding regardless of whether a public employee is enrolled in social security. This is a gross misapplication of federal law.

While broad, social security coverage is not universal. By definition, it covers specified employment which expressly does not include services of employees "in the employ of a State, or any political subdivision thereof, or any instrumentality" of a state. 42 U.S.C. § 410(a)(7). However, this exclusion of social security coverage for state employees does not apply to services "included under an agreement [between the state and federal government] authorized under section 418." 42 U.S.C. § 410(a)(7)(A). Section 418 of the statute authorized voluntary agreements between states and the federal government, which were to "be applicable to any one or more coverage groups designated by the State". 42 U.S.C. § 418(c)(1).

Washington's Basic Agreement enrolled "retirement system coverage groups." Thus, during the relevant time period only Washington employees eligible for a retirement program were enrolled in social security.[24] Because Petitioners were not eligible for a state retirement program they were not enrolled in social security under the Basic Agreement.

Financing of social security comes from taxes imposed on covered employees and employers. 26 U.S.C. §§ 3101, 3111. The employer is to collect the tax on covered wages from the employee through wage deductions. 42 U.S.C. § 3102(a).

What the Washington Supreme Court totally disregarded was that the federal statute (FICA) imposes the tax only as to

---

[24] In 1990 the statute was amended to automatically enroll state employees not covered by a retirement program, effective July 1, 1991. *See* Pub. L. No. 101-508, codified as 42 U.S.C. § 410(a)(7)(F). This has no effect on Petitioners' claims.

wages earned in "employment" as defined in the statute. 26 U.S.C. § 3101(a). Under the statute, covered employment expressly excluded "service performed in the employ of a state, or any political subdivision thereof, or any instrumentality" of the state, except where the service was "included under an agreement entered into pursuant to section 218 of the Social Security Act [42 U.S.C. § 418]." 26 U.S.C. § 3121(b)(7)(E).

Thus the federal statutory scheme unquestionably limits application of the tax under FICA only to state employees who are included in the agreement between the state and the federal government. Because the services of Petitioners were not included under Washington's Basic Agreement,

federal law did not allow their wages to be withheld for social security.[25]

In "assuming" that Petitioners' employment contracts authorized the University to withhold wages for social security, the Washington Supreme Court wrongly interpreted and applied federal law. It construed federal law as authorizing wage deductions for FICA taxes or contributions even if the employee was excluded from social security coverage. The court has thus required Petitioners to pay a federal tax when the federal law imposing that tax expressly exempted them. This serious misinterpretation and misapplication of federal law must be reviewed.

---

[25] State law is consistent with the federal statutes. The state employer was authorized to withhold wages only from employees "whose services are covered by an agreement", *i.e.*, the Basic Agreement. RCW 41.48.040. The amount authorized to be withheld was the amount of the FICA tax "if such services constituted employment within the meaning" of FICA. *Id.* Since employment under FICA was limited to services included under the Basic Agreement (26 U.S.C. § 3121(b)(7)(E)), no amount was due from Petitioners.

CONCLUSION

Several thousand employees have had their wages diverted from them - wages they contracted to receive, earned, and even paid income tax on. Their wages were diverted and have not been refunded because the University chose to continue withholding wages for social security from Petitioners even though they were not liable for withholding as a matter of federal law. Yet the University has treated other employees directly the opposite by correctly applying the law, timely stopping their wage withholding, and providing them wage refunds.

Through its rulings the Washington Supreme Court has excused the University, a state institution, from its errors. In doing so Petitioners have been singled out and treated differently from other similar claiming employees. Petitioners have not

been afforded equal protection under the laws.

The Washington court's treatment of these claims directly raises the extent to which a state appellate court can deny citizens due process as guaranteed by the Fourteenth Amendment. Petitioners have been denied notice and an opportunity to be heard on the legal and factual issues determined by the Washington court.

Federal social security law has been blatantly disregarded, such that Petitioners, who were not enrolled in social security, have been subjected to a tax from which federal law has expressly exempted them.

These federal and constitutional questions must be reviewed or Petitioners will have been denied a remedy for the wrongful

taking of their wages. This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PHILLIP D. NOBLE *
KAREN J. VANDERLAAN
HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, Washington 98101
(206) 292-1144

Counsel for Petitioner
Richard L. Pope, Jr.
and the class
December 17, 1993

* Counsel of Record

(2)

Supreme Court, U.S.
FILED
DEC 17 1993
OFFICE OF THE CLERK

NO. 93-962

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

RICHARD L. POPE, JR.
on behalf of himself and the class of all persons similarly situated,
Petitioners,

v.

UNIVERSITY OF WASHINGTON,
an instrumentality of the State of Washington,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF WASHINGTON

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

PHILLIP D. NOBLE
HELSELL, FETTERMAN, MARTIN
TODD & HOKANSON
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, Washington 98101
(206) 292-1144

Counsel for Petitioners

December 17, 1993

4389

TABLE OF CONTENTS TO APPENDICES

		Page
APPENDIX A	*Richard L. Pope, Jr. v. the University of Washington*, 121 Wash. 2d 479, 852 P.2d 1055 (1993)	A-1
APPENDIX B	Findings of Fact and Conclusions of Law, No. 90-2-13235-8 (Wash. Superior Ct., Dec. 5, 1991)	B-1
APPENDIX C	Motion for Reconsideration, No. 58938-1 (Wash. Supreme Ct., June 9, 1993)	C-1
APPENDIX D	Order Granting Motion for Reconsideration Without New Argument, No. 58938-1 (Wash. Supreme Ct., Sep. 21, 1993)	D-1
APPENDIX E	Order Changing Opinion, No. 58938-1 (Wash. Supreme Ct., Sep. 21, 1993)	E-1
APPENDIX F	Mandate, No. 58938-1 (Wash. Supreme Ct., Oct. 13, 1993)	F-1

APPENDIX G	Statutes	
	U.S. Const. amend. XIV, § 1	G-1
	26 U.S.C. § 3101	G-2
	26 U.S.C. § 3121(a), (b) . . .	G-2
	42 U.S.C. § 410(a)(7)	G-5
	42 U.S.C. § 418	G-7
	RCW 41.48.040	G-9
	RCW 41.48.050	G-10
	RCW 49.48.010	G-13
APPENDIX H	Stipulation and Order Re: Order Granting Motion to Redefine the Class, No. 90-2-13235-8 (Wash. Superior Ct., July 13, 1993)	H-1
APPENDIX I	Order, No. 58938-1 (Wash. Supreme Ct., Oct. 6, 1993) .	I-1
APPENDIX J	Excerpts from the Deposition of Howard Cottrell (March 15, 1991)	J-1
APPENDIX K	Minutes of Meeting on Social Security Refunds, August 26, 1987	K-1
APPENDIX L	Excerpts from the Deposition of Tallman Trask (Sep. 4, 1991)	L-1

APPENDIX A

121 Wash. 2d 479, 852 P.2d 1055

[No. 58938-1. En Banc. May 20, 1993.]

RICHARD L. POPE, JR.,

Respondent,

v.

THE UNIVERSITY OF WASHINGTON,

Appellant.

Dolliver and Smith, JJ., did not participate in the disposition of this case.

NATURE OF ACTION: A state university employee who was not eligible for retirement systems coverage brought a class action seeking refunds of Social Security taxes withheld.

SUPERIOR COURT: The Superior Court for King County, No. 90-2-13235-8, Mary Wicks Brucker, J., on August 1, 1991, entered (1) a partial summary judgment in favor of the class for breach of contract and violation of RCW 49.48.010 and (2) a partial summary judgment in favor of the universi-

ty on the misrepresentation, nondisclosure, and breach of fiduciary duty claims. On December 5, 1991, the court entered a judgment awarding the class double damages, attorney fees, and costs for the university's willful withholding of wages.

SUPREME COURT: Holding that RCW 49.48.010 applies only to wage deductions at the termination of employment; that the university's deduction of Social Security taxes did not constitute a willful withholding of wages; and that the misrepresentation, nondisclosure, and breach of fiduciary duty claims lacked merit, the court *affirms* the partial summary judgment in favor of the university, *reverses* the partial summary judgment and the judgment in favor of the class, and *grants* judgment in favor of the university.

Christine O. Gregoire, Attorney General, and *William B. Collins, Division Chief,* for appellant.

Helsell, Fetterman, Martin, Todd & Hokanson, by *Phillip D. Noble*, for respondent.

Patrick E. McBride on behalf of the Department of Health and Human Services, amicus curiae.

UTTER, J. --

This class action concerns whether the defendant, the University of Washington (University), properly withheld social security taxes from the class employees, of which plaintiff, Richard Pope, is a member. The University appeals from the trial court's grant of partial summary judgment in favor of the class for breach of contract and violation of RCW 49.48.010. It also appeals the trial court's ruling, after a bench trial, that it intentionally withheld wages in violation of RCW 49.52.050 resulting in an award of double damages, attorney fees, and costs. The University further appeals the trial court's grant of the class' post-judgment motion to include temporary,

part-time, and student employees in the class and its denial of their motion for reconsideration on this issue. The class cross-appeals the trial court's grant of partial summary judgment in favor of the University on the breach of fiduciary duty, misrepresentation, and nondisclosure claims only if the trial court's ruling on liability is not upheld.

We reverse the trial court and hold the University did not violate either RCW 49.48.010 or RCW 49.52.050. This ruling disposes of the issues relating to the scope of the class. The trial court's rulings regarding the claims of breach of fiduciary duty, misrepresentation, and nondisclosure are affirmed.

Resolution of this case necessitates review of the 40-year history of social security coverage implementation at the University and the different views regarding coverage taken by the University, the

Employment Security Department (EMS), and the Social Security Administration (SSA) during that time span.

The opportunity for states to enroll public employees in social security became available in 1950 when Congress amended the Social Security Act to allow voluntary enrollment of public employees who were not otherwise covered by a retirement system. *See* Social Security Act Amendments of 1950, Pub. L. No. 81-734, § 218, 64 Stat. 477, 514-15 (1950) (codified in 42 U.S.C. § 418). In 1951, the Washington Legislature authorized the Governor to enter into a voluntary agreement with the federal government to provide social security coverage for public employees. Laws of 1951, ch. 184, § 3(a), p. 532; RCW 41.48.030(1). In that year, EMS, the agency designated to administer the program, entered into an agreement with the SSA, (the "Basic Agreement"). The Basic

Agreement extended social security coverage to

> all services performed by individuals as employees of the State and as employees of those political subdivisions listed in the Appendix attached hereto, other than services expressly excluded therein and except the following:
>
> (1) Any service performed by an employee in a position covered by a retirement system on the date the agreement is made applicable to the coverage group in which such employee is included.

Clerk's Papers, at 229. The University was not listed in the attached appendix.

In 1954, Congress lifted the prohibition against enrollment of employees covered by a retirement system. Pub. L. No. 83-761, § 101, 68 Stat. 1052, 1055 (1954) (codified in 42 U.S.C. § 418(d)). The next year, the University applied to EMS to extend social security coverage to

> all services performed by each of the eligible employees of the Applicant for whom coverage is requested, except the following:
>
> . . .
>
> (e) Services in positions which are not covered by the T.I.A.A.

> Retirement System of the University of Washington.
>
> (f) Services in positions which are covered by the State Employees' Retirement System.

Clerk's Papers, at 240 ("Application and Agreement"). Based upon the Application and Agreement, the State and federal government agreed in 1956 to Modification No. 81, which extended coverage to

> Services by individuals as employees of the following school of higher learning of the State, as members of a coverage group . . . of the University of Washington Teachers' Insurance and Annuity Association Retirement System [TIAA].

Clerk's Papers, at 244. The modification contained the exclusions listed in the Application and Agreement. In 1957, Modification No. 156 further extended social security coverage to employees covered by the Washington State Public Employees Retirement System (PERS).

Due to coverage inequities cited by the University's retirement and insurance officer and the recommendation of the

Controller, the Provost, in 1962, extended social security coverage to all faculty and staff except hourly paid students and certain nonresident aliens. In 1969, the University requested EMS to investigate whether monthly paid student employees were subject to social security. EMS sent this request to the SSA who replied that the Provost's 1962 action brought monthly paid student employees within the scope of Modification No. 81.

Subsequently in 1978, EMS requested an opinion from SSA as to whether the Basic Agreement established a retirement systems coverage group or an absolute coverage group, that is, a coverage group of state employees not in retirement systems positions. The SSA regional attorney concluded that state employees were covered as an absolute coverage group.

The SSA then requested EMS to investigate whether the University was properly

not reporting wages for hourly paid student employees. In January 1979, EMS informed the University that its failure to report the wages of all hourly paid student employees was considered a "group error", and the University would be billed for its matching contribution on the unreported wages. The University, however, maintained its position that hourly paid student employees were not covered, although there were interdepartmental communications questioning this position. Between 1978 and 1980, the Attorney General and EMS were attempting to resolve whether coverage existed for student employees. Finally, in May 1981, the Provost announced that all student employees, whether paid monthly or hourly, would be covered under social security beginning July 1, 1981.

Before this practice was implemented, however, the regional attorney reversed

the earlier position and concluded the Basic Agreement established a retirement systems coverage group. As a result, the SSA determined the University's deduction of social security from hourly paid student employees was proper, thus resolving the group error. The University then rescinded its decision to begin withholding social security from all student employees.

In March 1983, EMS informed the University that the SSA had determined only employees in retirement systems eligible positions were covered by social security. EMS advised the University it was in the process of considering whether individuals could retain social security wage credits which were erroneously reported and requested the University withhold any action to exclude employees working on a part-time or temporary basis until it was notified by EMS. In October 1983, EMS notified

all state agencies, including the University, on the correct method for determining retirement eligibility, for making the appropriate adjustments, and for deleting wage credits. The University was directed to determine which positions were ineligible for retirement systems coverage and to forward this list and the necessary adjustment reports to EMS.

On November 17, 1983, the University determined that 12 graduate student positions were ineligible for social security coverage and requested EMS to concur in this determination before processing the refunds. EMS responded it was unclear whether the Board of Regents had authorized the Provost's extension of retirement system coverage to these positions in 1962 and that this issue needed to be resolved. The University requested the Attorney General review this matter, and on January 3, 1984, the Attorney General

responded that the Board of Regents had never authorized the Provost to extend retirement systems coverage to graduate students or degree candidates.

To challenge the SSA's position that graduate students were covered by social security, EMS and the University decided to use the request for a refund from one graduate student assistant as a "test case". This request was forwarded to the SSA which, after an initial denial in April 1985, reversed its position and approved the refund in August 1987 because it found the Board of Regents had never extended retirement systems coverage to graduate students. The University limited the refunds to graduate student research assistants (RA) and teacher assistants (TA).

On July 22, 1988, Richard Pope requested the University cease withholding social security from student employees holding

positions with the Associated Students of the University of Washington (ASUW) and the Graduate and Professional Student Senate (GPSS) on the basis that these students were also ineligible for retirement systems coverage. Pope was a law student enrolled at the University and in 1988 was elected as a student government representative. Pope was appointed on a temporary and part-time basis to the position of ASUW appointee (job class 0890), which is a monthly paid position. Pope alleges the University originally responded to him by offering retroactive refunds through January 1, 1989, on the condition that the ASUW convert the student positions from monthly to hourly paid positions.

In May 1989, the University determined that 52 job classes, in addition to the RA's and TA's, were not eligible for TIAA or PERS, but were having social security

withheld. The payroll manager advised the Controller in July 1989 that under the terms of the Basic Agreement, only those positions that were eligible for TIAA or PERS were eligible for social security. Then, on December 12, 1989, the University announced it would discontinue social security coverage beginning January 1, 1990, for certain faculty and academic staff positions which were ineligible to participate in TIAA or PERS. On December 29, 1989, the University also exempted ASUW Appointees from social security beginning January 1, 1990.[1] The University then informed Pope of the changes occurring as of January and provided him with

---

[1] Effective July 1, 1991, all employees of the state except student employees must be covered by social security. Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, 104 Stat. 1388 (1990). Social security for student employees remains an option for states. Internal Rev. Serv., Publication 15, *Circular E, Employer's Tax Guide* (Rev. January 1993), p. 22.

the necessary information to seek a refund.

Pope filed this action on June 28, 1990, in the King County Superior Court alleging breach of contract, violation of RCW 49.52.050, violation of RCW 49.48.010, breach of fiduciary duty, misrepresentation, and nondisclosure. The trial court certified the class as including all persons employed by the University between March 14, 1983, through February 1, 1991, in positions which were not eligible for retirement system coverage but from whom the University withheld social security. The parties filed cross motions for summary judgment.

On August 1, 1991, the trial court granted summary judgment in favor of the class on the breach of contract and violation of RCW 49.48.010 claims; granted summary judgment in favor of the University on the misrepresentation, nondisclo-

sure, and breach of fiduciary duty claims; and denied the University's motion to redefine the class based upon the 3-year statute of limitation. On December 5, 1991, after a bench trial on the class' claim for violation of RCW 49.52.050, the trial court awarded double damages, attorney fees, and costs to the class. The University's motion for a new trial and for reconsideration was denied.

The University appealed to this court and the class cross-appealed. The class made a post-judgment motion to the trial court to compel the University to include all temporary, part-time, and student employees in the class. The trial court granted this motion and denied the University's motion for reconsideration. The University appealed these two post-judgment orders. On December 2, 1992, this court accepted review of the case.

On appeal, the parties' arguments focus largely upon whether the Basic Agreement, as modified, authorized the University to withhold social security from the class. The University argues the Basic Agreement established an absolute coverage group which covered all state employees who were not members of a retirement system, which included the class members. The class and the United States Department of Health and Human Services, as amicus curiae, contend retirement systems coverage was established. The class, however, does not claim standing to challenge whether the University breached the Basic Agreement; rather, the class asserts the University breached its employment contracts with the class members. Consequently, the interpretation of the Basic Agreement is relevant to the class' breach of contract claim only to the extent there is a term in the employment contracts which prohib-

its withholding social security unless authorized. Without such a term, the breach of contract claim must fail.

The trial court found the employment contracts at issue were formed by the University promising to pay a gross wage and the class employees accepting by performance. *See Haugen v. Central Lutheran Church*, 58 Wn.2d 166, 361 P.2d 637 (1961) (the relationship between an employer and an employee is based on contract). The class argued the University was not authorized to withhold social security and, therefore, failed to meet its contractual duty to pay the gross wage. The issue, then, is whether the employment contracts contained a term obligating the University to refrain from withholding social security from the gross wage unless authorized.

The class did not present any evidence that such a contract term was contained, expressly or by implication, in the em-

ployment contracts. It argues statutes which affect the subject matter of a contract and which exist at the time of a contract's execution are incorporated therein and become a part of the contract. *Rones v. Safeco Ins. Co. of Am.*, 119 Wn.2d 650, 656, 835 P.2d 1036 (1992); *Wagner v. Wagner*, 95 Wn.2d 94, 621 P.2d 1279 (1980); *In re Marriage of Rufener*, 52 Wn. App. 788, 791, 764 P.2d 655 (1988), *review denied*, 112 Wn.2d 1008 (1989). Both parties agree the wage statutes, RCW 49.48 and RCW 49.52, are incorporated into the employment contracts. Thus, a determination of liability under either RCW 49.48.010 or RCW 49.52.050(2) also determines whether the University breached its employment contract with each class member.

The trial court ruled on summary judgment that the University violated RCW 49.48.010 based on the following language:

> It shall be unlawful for any employer to withhold or divert any portion of an employee's wages unless the deduction is:
>
> (1) Required by state or federal law . . . .

This limitation on lawful deductions, however, must be read in the context of the statute as a whole. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 789, 719 P.2d 531 (1986). RCW 49.48.010 governs deductions made from wages at the termination of employment:

> When any employee shall cease to work for an employer, whether by discharge or by voluntary withdrawal, the wages due him on account of his employment shall be paid to him at the end of the established pay period . . . .

See Cameron v. Neon Sky, Inc., 41 Wn. App. 219, 703 P.2d 315, *review denied*, 104 Wn.2d 1026 (1985); *Brown v. Suburban Obstetrics & Gynecology, P.S.*, 35 Wn. App. 880, 670 P.2d 1077 (1983). The statute has not been applied in nontermination

cases. Because the class is not claiming the University made improper deductions to wages due at the termination of employment, the statute and the limitation on deductions are inapplicable. For this reason, the trial court erred in granting summary judgment in favor of the class.

The trial court also found, after a bench trial, the University violated RCW 49.52.050(2), which makes it a misdemeanor for any employer to:

> Wilfully and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract. . . .

RCW 49.52.070 creates civil liability for violation of RCW 49.52.050, including double damages, costs, and attorney fees.

We have previously interpreted and applied RCW 49.52.050. *See Chelan Cy. Deputy Sheriffs' Ass'n v. County of Chelan*, 109 Wn.2d 282, 745 P.2d 1 (1987); *Lillig*

v. Becton-Dickinson, 105 Wn.2d 653, 717 P.2d 1371 (1986); *Yates v. State Bd. for Comm'ty College Educ.*, 54 Wn. App. 170, 773 P.2d 89, *review denied*, 113 Wn.2d 1005 (1989); *Cameron v. Neon Sky, Inc.*, *supra*; *Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 663 P.2d 132, *review denied*, 100 Wn.2d 1005 (1983); *McAnulty v. Snohomish Sch. Dist. 201*, 9 Wn. App. 834, 515 P.2d 523 (1973); *Brandt v. Impero*, 1 Wn. App. 678, 463 P.2d 197 (1969). *Cameron*, however, is the only case concerning a disputed deduction from wages.

In *Cameron*, the employee, the managing officer of a restaurant, unilaterally increased his salary. When the owners learned of this they terminated him and deducted the "overpayment" from his last paycheck. The employee sued. The court held, as a matter of law, that the deduction of a disputed debt from "wages admit-

tedly owed" was not a willful withholding of wages. *Cameron*, 41 Wn. App. at 222.

We hold the University's deduction of social security was not a willful withholding of wages as a matter of law based on *Cameron*. Here, the University was "deducting the amount of an alleged debt from wages admittedly owed". *Cameron*, 41 Wn. App. at 222. The disputed "debt" is the employees' disputed social security deduction. Federal law dictates that such deductions are "considered to have been paid to the employee at the time of such deduction." 26 U.S.C. § 3123. By making the deduction, the University is not disputing the amount of the wage, but actually paying the wage to the employee. Consequently, the University was deducting the amount of a disputed employee debt from wages admittedly owed. This does not deprive the employee of wages under RCW 49.52.050. *Cameron*, 41 Wn. App. at 222.

Further, there is no substantial evidence in the record to support the trial court's conclusion that the University acted willfully and with the intent to deprive the employees of their wages. See *Lillig v. Becton-Dickinson, supra* at 660 (whether an employer acts "[w]ilfully and with intent" is a question of fact reviewed under substantial evidence standard).[2] Nonpayment of wages is willful and made with intent

> when it is the result of knowing and intentional action and not the result of a bona fide dispute as to the obligation of payment. . . .

Chelan, 109 Wn.2d at 300.[3] A finding of

---

[2] We review the record in light of the University's obligation to pay matching contributions for social security deductions made from the class' wages.

[3] The class' argument that RCW 49.52.050 establishes liability without fault is not persuasive. Lack of intent may be established either by a finding of carelessness or by the existence of a bona fide dispute. *See Yates v. State Bd. for Comm'ty College Educ.*, 54 Wn. App. 170, 176-77, 773 P.2d 89, *review denied*, 113 Wn.2d 1005 (1989); *Brandt v. Impero*, 1 Wn. App. 678, 681, 463 P.2d 197 (1969) ; *Ebling v. Gove's Cove, Inc.*, 34 Wn. App.

intentional nonpayment by a party who is not an individual requires the organization to reach a consensus regarding the action taken. *See Chelan Cy. Deputy Sheriffs' Ass'n*, 109 Wn.2d at 302-03.

The record contains testimony and supporting documentation regarding the many letters, memoranda, notices, and recommendations sent between the various University departments discussing whether specific classes of employees or employee job positions were covered by a retirement system or by social security. There is no evidence in the record, however, that the University reached a consensus as to whether specific job positions, other than RA's and TA's, were ineligible for social security until December 1989 when they

---

495, 501, 663 P.2d 132, *review denied*, 100 Wn.2d 1005 (1983). Affirmative evidence of intent to deprive an employee of wages, however, is necessary to establish liability under RCW 49.52.050.

announced the withholding would cease as of January 1, 1990.[4] Although the trial court found the University's delay in making a decision was, itself, a decision, there is no substantial evidence in the record this was a University decision made with the intent to deprive employees of their wages. Therefore, the trial court's determination there was a consensus within the University is not supported by substantial evidence.

The University did not violate RCW 49.52.050(2) or RCW 49.48.010. Consequently, the terms of the employment contracts were not breached by the University's deduction of social security from the class' wages. Our resolution of the liability issues makes it unnecessary to

---

[4] Because the Attorney General's office is not part of the University, it is inappropriate to rely, as did the trial court, on the correspondence from that office in determining whether the University reached a consensus on the social security eligibility of the class members.

reach the questions regarding the proper scope of the class.[5]

We turn to class' cross appeal of the trial court's grant of summary judgment in favor of the University on the breach of fiduciary duty, misrepresentation, and nondisclosure claims. The granting of summary judgment is reviewed to ascertain whether the class raises a genuine issue of material fact after viewing the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992).

The class argues a fiduciary relationship existed between the University and the class regarding the calculation and payment of wages. The law recognizes that

---

[5] We note the United States Department of Health and Human Services supported the University's deduction of social security from part-time, temporary, and student employees occupying positions under a state retirement system.

facts may create a fiduciary relationship between contracting parties. *See Liebergesell v. Evans*, 93 Wn.2d 881, 889-90, 613 P.2d 1170 (1980). Such relationships have been found where one party has superior knowledge and thereby induces reliance in the other party. *See Liebergesell*, 93 Wn.2d at 890-91 (citing *Salter v. Heiser*, 36 Wn.2d 536, 219 P.2d 574 (1950); *Graff v. Geisel*, 39 Wn.2d 131, 234 P.2d 884 (1951); *Gray v. Reeves*, 69 Wash. 374, 125 P. 162 (1912)). *See also Boonstra v. Stevens-Norton, Inc.*, 64 Wn.2d 621, 625, 393 P.2d 287 (1964).

For example, in *Liebergesell*, a widowed schoolteacher became friends with Mr. Kotowski, a state auditor, through the friendship of their daughters. Kotowski was aware and encouraged Liebergesell to regard him as a financial counselor and urged her to invest in his business. The court held these facts created an issue of

fact whether a fiduciary relationship existed. *Liebergesell*, 93 Wn.2d at 891.

Here, the class asserts it was justified in relying on the University's calculation and payment of wages because the University was in a position of superior knowledge. Although the University may have had superior knowledge as to the applicable federal and state laws governing the calculation and payment of wages, the class fails to raise a genuine issue of fact that the University used this position to induce reliance in the class. The trial court properly granted summary judgment in favor of the University on the breach of fiduciary duty claim.

The class also asserts the University concealed or failed to disclose only employees in positions eligible for retirement systems coverage were subject to social security, and the class employees were not in retirement eligible positions.

A precondition for finding liability is knowledge of the facts alleged to have been concealed or not disclosed. *See* Restatement (Second) of Torts § 551 (1977); *Haberman v. WPPSS*, 109 Wn.2d 107, 168, 744 P.2d 1032, 750 P.2d 254 (1987), *appeal dismissed*, 488 U.S. 805 (1988); *Liebergesell*, 93 Wn.2d at 891-92.

In this case, the class fails to raise a genuine issue of material fact that the University reached a consensus or "knew", prior to December 1989, which specific employee job positions were ineligible for retirement and social security coverage. The record does contain University inter-departmental memoranda and memoranda from the Attorney General's office discussing this issue, but, again there is no evidence of a consensus.

Lastly, the class contends the trial court erred in granting summary judgment on its misrepresentation claim. We dis-

agree. The class fails to raise a genuine issue of material fact that the University had a pecuniary interest in withholding social security from the class' wages. *See* Restatement (Second) of Torts § 552(1) and (2) (1977) (misrepresentation requires that false information be provided by one who "has a pecuniary interest"); *Haberman*, 109 Wn.2d at 161-62. Here, the University does not have a pecuniary interest in deducting social security because it was required to pay matching employer contributions for every deduction made.

We affirm the trial court's grant of summary judgment in favor of the University on the breach of fiduciary duty, nondisclosure, and misrepresentation claims. We reverse the summary judgment in favor of the class for breach of contract and violation of RCW 49.48.010 and direct summary judgment be issued in favor of the University on these claims. We also re-

verse the trial court's ruling that the University violated RCW 49.52.050(2) and reverse the award of double damages, attorney fees, and costs. We need not address the prejudgment interest issue raised by the University.

ANDERSEN, C.J. and BRACHTENBACH, DURHAM, GUY, JOHNSON, AND MADSEN, JJ., concur.

APPENDIX B

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

RICHARD L. POPE, JR., on behalf of himself and the class of all persons similarly situated,	NO. 90-2-13235-8
Plaintiffs,	FINDINGS OF FACT AND CONCLUSIONS OF LAW
v.	
UNIVERSITY OF WASHINGTON, an instrumentality of the State of Washington,	
Defendant.	

This matter was tried before the undersigned judge of the above-entitled court, without jury, from September 12, 1991, to September 19, 1991. Plaintiff was represented by his attorney, Phillip D. Noble of Helsell, Fetterman, Martin, Todd & Hokanson, and defendant was represented by Morton M. Tytler, Assistant Attorney General for the State of Washington. The

court heard oral testimony from numerous witnesses, was presented testimony by deposition for one witness, and admitted numerous exhibits into evidence. The court, by order dated February 1, 1991, previously certified plaintiff's claims against defendant as a class action under Civil Rule 23, with the class consisting of present and former employees of defendant and defined as:

> All persons who were employed by the University in positions not eligible under a state retirement program at any time since March 14, 1983, up to and including [February 1, 1991] and from whose wages the University of Washington withheld social security contributions.

By Order dated August 1, 1991, this court granted plaintiff's Motion for Partial Summary Judgment finding defendant liable for breach of contract and for violation of RCW 49.48.010 due to defendant's taking and withholding wages from plaintiff and the employees in the

class without right or authority to do so. By that same Order the court denied plaintiff's motion for summary judgment and granted defendant's motion for summary judgment regarding plaintiff's claims for recovery based upon breach of fiduciary duty, misrepresentation and nondisclosure. By Order dated August 1, 1991, this court denied defendant's motion to redefine the class based upon the statute of limitations and, treating defendant's motion as a motion for partial summary judgment, found that the claims of the class members were not barred by the statute of limitations. Trial was held on remaining issues, including the measure and amount of damage, exemplary damages under RCW 49.52.070, plaintiff's entitlement to attorneys fees, and other appropriate relief. Defendant also asked the court to reconsider its rulings on liability in connection with the Order granting the

plaintiff's Motion for Partial Summary Judgment. On September 25, 1991, after due consideration of the testimony, exhibits, and argument of counsel, the court announced its oral decision. Now, therefore, the court makes the following

FINDINGS OF FACT

1. Defendant University of Washington is, and at all times pertinent to this matter was, an agency or instrumentality of the State of Washington. The principal offices and facilities of defendant are, and have been, located in King County, Washington.

2. At all relevant times defendant employed persons to perform work or services for or on behalf of defendant. Persons employed by defendant were classified into various categories, called job classifications or positions. Defendant assigned a job classification number to each job classification or position.

3. Defendant promised to pay each person employed by it a wage which was set by defendant. The wage promised to be paid by defendant was to be paid if the employee performed the job or service he or she was hired to do. Defendant would typically take deductions from, or withhold a portion of, the employee's wages for such things as income taxes, social security, health insurance, and other similar items. Employees were not asked to, nor did they, individually authorize defendant to withhold any portion of their wages for social security.

4. Plaintiff Richard L. Pope, Jr., was elected to the position of Graduate and Professional Student Senate Representative to the Associated Students of the University of Washington Board of Control in 1988, and served in that position from June 15, 1988, to June 15, 1989. This position was an employee job position at

the University of Washington which was to be paid a wage by defendant. Defendant's job classification for this position was ASUW Appointee and had a job classification number of 0890. Employees in the ASUW Appointee position were not eligible to participate in a state retirement program. While in the ASUW Appointee position defendant withheld wages in the amount of $205.70 from plaintiff for social security.

5. At all the relevant times the Washington State Employment Security Department was responsible for administering social security coverage for state employees.

6. At all relevant times federal law exempted state and local government employees from social security and social security contributions unless they were covered under a voluntary agreement entered into between the Governor of the

state and the federal government, subject to the Medicare component of the social security contribution which was imposed on certain government employees after March 31, 1986, without the necessity of such an agreement. Such an agreement, sometimes referred as the "Basic Agreement," applicable to public employees in Washington was entered into in July 1951, and has been modified from time to time thereafter.

7. Public employees who were subject to social security because they were covered under the Basic Agreement were subject to having deductions taken from heir wages for social security contributions or taxes. The amount of deduction was set by federal law as a percentage of the employee's earned wages. The public entity which was the employer was authorized by statute to withhold the amount of the deduction from the wages of the employee

who was subject to social security. Public employees not subject to social security were not subject to having social security deductions taken from their wages.

8. During the 1970s the federal Social Security Administration began to question defendant's practice of not withholding wages from hourly paid student employees for social security. Defendant had never withheld social security contributions or taxes from the wages of hourly paid student employees.

9. Defendant, with the help of the Washington State Attorney General's office, extensively reviewed the history and background of the Basic Agreement and the relevant modifications to that Agreement, and presented facts to the federal Social Security Administration and the Washington State Employment Security Department establishing that the Basic Agreement did

not extend social security coverage to all state employees as an absolute coverage group. Instead, the facts, as developed and presented by defendant, established that the Basic Agreement extended social security coverage only to those state employees who were in job positions which were entitled to participate in a state retirement program.

10. At all relevant times eligible employees of defendant participated in two state retirement systems. Academic personnel participated in a program through the state and administered by the Teachers Insurance and Annuity Association, referred to as TIAA or TIAA/CREF. Non-academic personnel participated in the Public Employment Retirement System, referred to as PERS. Employees in some of defendant's job positions were not eligible to participate in either program.

11. In June 1981, the federal Social Security Administration and the Washington State Employment Security Department, after considering the materials submitted by defendant, agreed with defendant that the Basic Agreement did not extend social security coverage to all state employees as an absolute coverage group but instead extended coverage on a retirement program eligibility group basis. As of June 1981, all relevant parties to the Basic Agreement, i.e. the federal government, the State of Washington, and the University of Washington, agreed that only those state employees who were in job positions eligible to participate in a state retirement program, namely, either TIAA or PERS, were covered by and subject to social security. Because hourly paid student employees were not eligible to participate in either retirement plan they were not subject to social security, and defendant was not to

withhold their wages from them for that purpose.

12. On March 14, 1983, the State Employment Security Department sent a Special Notice to all state agencies, including defendant, on the subject of social security. This Special Notice told defendant that the Social Security Administration had "determined that the state acquired social security coverage as a 'retirement system' coverage group" and that "only those state positions that are eligible for retirement system coverage are included for social security purposes." This Special Notice directed all state agencies, including defendant, to identify job positions ineligible for retirement system coverage so that they could be removed from social security and arrangements made to provide refunds of wages withheld in prior years back through 1980. The State Employment Security De-

partment sent a second notice to state agencies, including defendant, on October 24, 1983, again directing each state entity to determine which job positions were ineligible for social security and to arrange for a refund to the ineligible employees of wages which had been withheld in prior years.

13. In response to an inquiry made by defendant concerning these notices, the State Employment Security Department again advised defendant that, in 1981, as a result of information supplied by defendant, the Social Security Administration had resolved the question of the interpretation of the Basic Agreement as providing retirement system coverage rather than absolute coverage. The State Employment Security Department told defendant that whenever an error in reporting social security eligibility was discovered such error was to be corrected, and that there

was no provision which would allow employees to retain social security credit erroneously reported. Defendant was also told that a decision to make corrections concerning social security coverage prospectively only, rather than correcting prior years, would be open to challenge by any affected individual.

14. In response to these notices, defendant, on November 17, 1983, identified and submitted a list of twelve graduate student job positions which defendant represented were not eligible under any of the state's retirement systems and hence were not subject to social security. This meant that employees in those positions would not be subject to wage withholding for social security in future years and would be entitled to a refund of wages withheld in prior years back through 1980. At that time there were other job positions which were likewise not eligible

under any of the state's retirement systems and not subject to social security, but which were not listed or identified by defendant. Rather than discontinue withholding of the wages of the employees in these other job positions, the University continued, and intended to continue, to withhold wages from those employees for social security.

15. The Social Security Administration questioned the correctness of defendant's identification of the twelve graduate student job positions on the grounds that an administrative action by defendant's Provost in May 1962, apparently had extended social security coverage to graduate student job positions. Throughout 1984 and 1985 defendant, with advice and assistance from the Washington State Attorney General's Office and the State Employment Security Department, repeatedly and consistently pointed out that social

security coverage was dependent upon whether the job position was eligible to participate in a state retirement program, and explained that the graduate student positions had never been included in a state retirement program. Defendant submitted to the Social Security Administration facts showing that only defendant's Board of Regents had authority to include job positions in the TIAA retirement plan and that the Board of Regents had never officially included graduate students. Defendant proved as a fact that the 1962 Provost's action was without authority and thus null and void.

16. In 1987 the Social Security Administration agreed that the twelve graduate student job positions had never been made eligible for a state retirement program and thus were not subject to social security. Accordingly, defendant stopped withholding wages for social security from

employees in those positions. Defendant also undertook a process to identify and seek out all employees who had been in those positions since 1979, to notify those employees that they were entitled to a refund of wages that had been withheld from them, and to return to those employees the wages previously withheld.

17. In August 1987, officials of defendant, including the Controller, the Payroll Director, the Vice-Provost, and others, met to discuss the fact that job positions other than the previously identified twelve graduate student positions were similarly not eligible for a state retirement program and thus would likewise not be subject to social security. Although they realized that these similarly placed employees existed, these officials decided to take no action to stop withholding wages from them at that time. Instead, defendant intentionally continued

to withhold wages from these similarly placed employees for several years thereafter. At that time it was possible to recover from the federal government wages which had been withheld from these employees back through 1980. However, because defendant chose not to take action regarding these employees, that opportunity has been lost due to time limitations set by federal law.

18. On several occasions during 1988 and 1989 responsible officials at the University of Washington considered whether social security wage withholding should be stopped for employees in additional job positions because those job positions were not eligible to participate in a state retirement program. Defendant on occasion sought advice from the State Attorney General's Office as to whether wage withholding should cease as to employees in certain additional job positions, and on

each occasion the Attorney General advised that wage withholding should stop because the employees were not in job positions eligible to participate in a state retirement program. However, defendant continued to withhold wages from those ineligible employees.

19. In late 1989 defendant, after receiving advice from the State Attorney General's Office, determined that there were at least 52 job positions which were not subject to social security in addition to the graduate student positions identified in 1983, and recognized that there could be many other such job positions. The 52 job positions included the job position of ASUW Appointee, the position held by plaintiff. Beginning January 1, 1990, defendant stopped withholding wages from employees in only 32 job positions, including the ASUW Appointee position. This action was taken in response to the

1983 notices from the State Employment Security Department. Defendant intentionally continued withholding wages from employees in other job positions even though they were not eligible for a state retirement program. Defendant changed one position (Senior Fellow, classification number 0445) to a retirement eligible position as of January 1, 1990, although previous to then employees in that position had not been eligible to participate in a state retirement program but had wages withheld from them for social security.

20. When defendant stopped social security withholding from employees in the 32 job positions as of January 1, 1990, it did so on a prospective basis only, and made no effort to provide for the return of wages taken from these ineligible employees in prior years. Defendant adopted a policy of not advising present and for-

mer employees in those positions that they had not been subject to social security in prior years and that they were entitled to a refund of previously withheld wages. Defendant took no steps to identify present or former employees in those positions who had had social security withheld from their wages even though they were not subject to social security, nor did defendant send or provide notice to such employees that they were entitled to a return of withheld wages. This was in contrast to the actions taken by defendant in connection with the graduate student positions identified in 1983, where defendant aggressively undertook to identify, process claims for, and return wages to graduate student employees.

21. Instead of identifying and notifying employees who were not subject to social security because they were employed in ineligible job positions removed from

social security withholding in January 1990, defendant adopted a procedure of helping employees obtain refunds from the federal government but only if the employee asked for a refund. Because present and former employees were not given notice of any right to obtain a refund, such requests were limited. Defendant unilaterally stopped this assistance in March 1991, after aiding only a small percentage of eligible employees. Simultaneously, defendant was seeking to persuade the State Employment Security Department to change the Basic Agreement retroactive back to 1951 to make all employees subject to social security. This was in complete contradiction of the facts previously developed by, and the position taken by, defendant during the relevant time period in connection with hourly student and graduate student employees as well as the employees in the 32 job positions removed

from social security in January 1990. This effort to change retroactively the Basic Agreement would potentially have eliminated any right to the return of wages by the affected employees. This effort was rejected by the State Employment Security Department.

22. Defendant knew that plaintiff and other employees were employed by defendant in job positions which were not covered by a state retirement program. Under the Basic Agreement as understood and followed by defendant, plaintiff and such other employees were not covered by the Basic Agreement and not subject to social security. Despite the knowledge that plaintiff and other employees were not in job positions eligible to participate in a retirement program, defendant withheld wages from these employees for social security.

23. Defendant maintained and operated a Payroll Department, which was responsi-

ble, among other things, for processing the data and information necessary for issuing paychecks to defendant's employees. Paychecks were prepared and issued to employees twice a month. Actions taken by the Payroll Department reflected the policies and decisions made by defendant and its responsible officials regarding payroll and the payment of wages to its employees.

24. In connection with preparing the paychecks certain wage deductions were taken from those paychecks, including social security withholding. Defendant's Payroll Department was responsible for administering wage withholding for social security. When defendant withheld wages for social security it knew that it was withholding wages and intended to withhold those wages with the intention of depriving the employee of the amount of wage withheld. Such withholding was not done

accidently or as the result of carelessness.

25. Defendant did not withhold wages for social security from plaintiff and other employees not subject to a state retirement program because of any dispute over whether an employee was subject to social security under the Basic Agreement. The standard for determining whether an employee was subject to social security (i.e., whether the employee's job position was eligible to participate in a state retirement program) was established throughout the relevant time period and defendant and its officials were aware of this standard.

26. As a result of defendant's actions, plaintiff and the members of the class he represents have been damaged and injured by having wages taken and withheld from them by defendant which should not have been taken and withheld. The amount

of the damage and harm sustained by plaintiff and the members of the class he represents is the amount of wage withheld from each of them by defendant from each semi-monthly paycheck.

27. Defendant kept and maintained payroll records in computerized or other form during the relevant period. From the records kept and maintained by defendant it is possible to obtain payroll information concerning the employees in the class affected by this action, including the employee's name, the employee's wages, and the amount of wage withheld by defendant on a semi-monthly basis. This information is accessible by defendant, and it would be more efficient for defendant to retrieve and develop this information than for plaintiff or another third party to do so.

28. Throughout the relevant time period defendant provided or distributed

no manual, form, notice, descriptive sheet, flyer or other document or material to its employees advising or explaining to them that whether the employee was subject to wage withholding for social security depended upon whether the employee was in a position which was eligible to participate in a state retirement program. Defendant did not provide or give plaintiff nor the employees in the class plaintiff represents anything which indicated that defendant's withholding of wages for social security was not warranted or proper. Although defendant provided its employees with a semi-monthly earnings statement which showed that certain deductions, including withholding for social security, were taken from the employee's wages for that pay period, nothing in that earnings statement indicated to employees in the class, or would cause them to know or believe, that defendant's withholding of

wages for social security was not authorized, unwarranted, or improper. Neither plaintiff nor the class of employees he represents knowingly submitted defendant's unauthorized withholding of their wages.

29. Defendant has provided no evidence of a value or amount by which the damage or harm sustained by plaintiff or the employees he represents should be reduced or diminished.

30. Plaintiff Richard L. Pope asked defendant on more than one occasion to return to him the wages defendant had taken from him for social security. Defendant has not returned those withheld wages to Mr. Pope.

Based upon the foregoing Findings of Fact, the court hereby makes the following

CONCLUSIONS OF LAW

1. The Court reaffirms its rulings as contained in its Order of February 1, 1991, regarding class certification and

its two Orders of August 1, 1991, concerning its summary judgment ruling on liability and regarding the defense of the statute of limitations, except that the definition of the class is redefined as follows:

> The class includes all persons who were employed by the University of Washington in positions not eligible under a state retirement program at any time since March 14, 1983 up to and including February 1, 1991, and from whose wages the University of Washington withheld social security contributions, with the exception of graduate student employees employed during this period of time in jobs with the following position titles:
>
> Predoctoral Instructor
> Predoctoral Lecturer
> Predoctoral Researcher
> Predoctoral Teaching Associate 2
> Predoctoral Teaching Associate 1
> Teaching Assistant
> Predoctoral Research Associate 2
> Predoctoral Research Associate 1
> Research Assistant
> Predoctoral Staff Associate 2
> Predoctoral Staff Associate 1
> Graduate Staff Assistant

2. At all relevant times defendant was an "employer" within the meaning of RCW

49.48.010, 49.48.030, 49.52.050 and 49.52.070.

3. Defendant had no right or authority to withhold wages from its employees for social security unless authorized to do so by the employee or by law. No such authorization existed with regard to the employees in the class. Defendant was only authorized to withhold wages for social security from employees who were covered by the Basic Agreement, as modified over time. Plaintiff and the employees in the class were not covered by the Basic Agreement.

4. It is a breach of contract for defendant to have failed to pay plaintiff and the employees in the class plaintiff represents the full wage offered and promised by defendant for the job to be performed because defendant withheld and took wages from the employee for social securi-

ty when defendant had no right or authority to do so.

5. It is a violation of RCW 49.48.010 for defendant to have failed to pay plaintiff and the employees in the class plaintiff represents the full wage offered and promised by defendant for the job to be performed because defendant withheld and took wages from the employee for social security when defendant had no right or authority to do so.

6. Defendant's violation of RCW 49.48.010 entitles each employee to recover from defendant the full amount of the wages withheld by defendant from that employee for social security.

7. Defendant was not required or empowered by state or federal law to withhold wages for social security from plaintiff or the employees in the class he represents.

8. The measure and amount of damage sustained by plaintiff and each of the employees in the class plaintiff represents due to defendant's breach of contract is the amount of wages defendant withheld for social security (subject to the reductions or set-offs described below), and plaintiff and each employee in the class are entitled to recover that amount from defendant.

9. Defendant is not entitled to any reduction or set-off against the amount plaintiff and each employee in the class are entitled to recover from defendant due to having been improperly enrolled in social security or by having contributions improperly made to social security on their behalf.

10. Defendant is not entitled to any reduction of or set-off against the amount plaintiff and each employee in the class are entitled to recover from defendant,

except (1) to the extent such person has already received a refund or repayment of all or a portion of the wages withheld for social security, and (2) to the extent the Medicare component of the tax or contribution was properly deducted and withheld (which is to be deducted after the calculation of any interest or exemplary damages), and (2) to the extent the Medicare component of the tax on contribution was properly deducted and withheld (which, if applicable, should be deducted before the calculation of any interest or exemplary damages).

11. The amount of wages defendant withheld from plaintiff and each of the employees plaintiff represents is a liquidated amount fixed as of the date of the paycheck from which the wages were withheld, and plaintiff and each employee in the class are entitled to prejudgment

interest on that amount commencing on the date of each withholding.

12. Defendant, willfully and with intent to deprive plaintiff and each employee in the class of a part of the wages owed to them, paid plaintiff and each employee in the class a lower wage than the wage defendant was obligated to pay such employees, all in violation of RCW 49.52.050, and that therefore, under RCW 49.52.070, plaintiff and each employee in the class are entitled to an additional award of twice the amount of wages withheld by way of exemplary damages.

13. The claims of the employees in the class represented by plaintiff are not barred under the doctrines of either laches or estoppel.

14. Pursuant to RCW 49.48.030 and/or RCW 49.52.070, plaintiff is entitled to recover from defendant reasonable attorneys fees plus cost of suit in an amount

to be set by separate findings of this court.

15. Alternatively, plaintiff is entitled to recover from the award granted to the class of employees herein reasonable attorneys fees plus costs and expenses incurred in prosecuting this action on their behalf in an amount to be set by separate findings of this court.

16. Defendant should bear the responsibility and cost of identifying individual employees in the class, locating those employees, notifying those employees of their recovery as provided herein, calculating the amounts to be paid, processing the claims of such employees for such recovery, and paying such employees the amount owed.

17. The court should retain jurisdiction over the identification, notification, and payment process as described in the foregoing paragraph, and plaintiff and

plaintiff's counsel should monitor, advise, and assist defendant in completing that process.

18. Plaintiff, individually and on behalf of the class of employees plaintiff represents herein, should have judgment against defendant in the amount of the wages withheld by defendant for social security from each employee during the time period established by the court order of February 1, 1991, certifying this cause as a class action, prejudgment interest, exemplary damages, attorneys fees, expenses and costs as stated above, together with statutory attorneys fees and costs pursuant to RCW 4.84.080.

19. Defendant should have judgment against plaintiff and the class of employees he represents dismissing the claims of recovery based upon breach of fiduciary duty, misrepresentation, and nondisclosure.

DONE IN OPEN COURT this 5th day of December, 1991.

/s/ Mary W. Brucker
HONORABLE MARY W. BRUCKER
Judge of the Superior Court

Presented by:

HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON

By /s/ Phillip D. Noble
Phillip D. Noble
WSBA #3530
Attorneys for Plaintiff

Received and approved
as to form:

By /s/ Morton W. Tytler
Morton M. Tytler
WSBA #4139
Assistant Attorney General
Counsel for Defendant

APPENDIX C

No. 58938-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RICHARD L. POPE, JR., on behalf of himself and the class of all persons similarly situated,

Respondents/Cross-Appellants,

v.

UNIVERSITY OF WASHINGTON, an instrumentality of the State of Washington,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

THE HONORABLE MARY S. BRUCKER

MOTION FOR RECONSIDERATION

Phillip D. Noble
HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON
1500 Puget Sound Plaza
1325 Fourth Avenue
P. O. Box 21846
Seattle, Washington 98111
(206) 292-1144

TABLE OF CONTENTS

I. STATEMENT OF RELIEF SOUGHT . . C-3

II. ARGUMENT AND AUTHORITY C-6

A. Background and Effects of Decision C-6

B. Failure to Pay Contracted Wage Is a Breach of Contract C-12

C. RCW 49.48.48.010 Allows Recovery to the Class C-19

D. Granting Summary Judgment, *Sua Sponte*, Denied the Class Constitutional Due Process C-25

E. Relief Under RCW 49.52.050 Is Appropriate C-32

III. CONCLUSION C-39

I. STATEMENT OF RELIEF SOUGHT

Richard Pope and the class of University employees respectfully request this court to reconsider its decision filed May 20, 1993. That decision not only has deprived them, without due process, of a remedy to recover the wages owed but withheld from them, but also deprives the University and the State treasury of substantial funds. The decision creates an unheard of rule of contract law that it is not a breach of contract for a party, without right or authority, to unilaterally reduce the amount owed unless there is an additional express term prohibiting that party from doing so. It says there is no implied obligation to pay the amount promised because there is nothing expressly "obligating [the party] to refrain from withholding [payments] unless authorized." Op. p. 11. The decision also granted summary judgment on issues which have never

been argued and where there exist unresolved issues of fact, all contrary to CR56. The decision creates new rules allowing employers to deprive employees of wages and unduly limit Washington's wage statutes, which heretofore have been deemed remedial and liberally applied.

The court is asked to reconsider the following points and either remand for further proceedings or affirm the present judgment:

1. Reconsider the ruling that it is not a breach of contract for an employer to withhold wages from an employee unless there is an express contract term prohibiting withholding. Instead, under settled contract law, it should be held there is at least an implied, if not an express, term that the full promised wage will be paid and that wages may be withheld only if the employee agrees to the withholding or it is authorized by law.

2. Reconsider the ruling that the wage statute, RCW 49.48.010, provides a remedy for recovery of wages only for wages owed when the employment is terminated. This ruling, coupled with the previous ruling, deprives an employee of <u>any</u> <u>remedy</u> to recover wages owed without first quitting his or her job and violates equal protection by "draw[ing] an arbitrary line be-

tween otherwise identical claims." *Logan v. Zimmerman*, 455 U.S. 422, 441-442 (1982) (concurrence).

3. Reconsider the "consensus" rule the court has grafted onto RCW 49.52.050, whereby an employer can avoid a finding of "willfulness" simply by avoiding making any decision or, alternatively, giving the false impression of "doing something". *See Empire Detroit Steel v. OSHRC*, 579 F.2d 378, 384-386 (6th Cir. 1978);

4. Reconsider the finding of fact this court made (contrary to the trial court) that there was no evidence to support a finding of willful withholding of wages under RCW 49.52.050.

5. Reconsider the granting, *sua sponte*, of summary judgment for the University on the issue of whether wages were owed these employees upon termination of their employment, and instead remand the case for further proceedings consistent with this decision. The decision's dismissal denies the class constitutional due process and equal protection. There are, in fact, some class members, including Mr. Pope, <u>who have terminated</u> with the University and have not been repaid their wages. This defense was not asserted by the University as a basis for summary judgment; thus the class has been denied their day in court.

II. ARGUMENT AND AUTHORITY

A. Background and Effects of Decision.

The trial court found that the University failed to pay wages owed to the class employees in breach of its employment contract and in violation of RCW 49.48.010 and 49.52.050 when it withheld wages for social security from employees who were not subject to withholding.[1]

On appeal it was held that unless there is an express provision to the contrary, there is nothing in an employment contract that prevents an employer from withholding wages from an employee, even where the employer has no right or authority to do so in the first place. Recovery under RCW 49.48.010 (prohibiting unauthorized wage withholding) was restricted to only wages

---

[1] The rule, established at the insistence of the University and applied throughout the state since 1981, was that employees not eligible to participate in a state retirement program were not covered by social security and thus not subject to withholding.

due at the termination of employment. Thus the class employees have no remedy against their employer who withheld their wages without right or authority.

The decision also says that an employer may divert owed wages and not actually give the wages to the employee, yet not violate RCW 49.52.050.[2] The decision also weighed the evidence and overruled the trial court's findings that the University withheld wages "willfully and with intent to deprive the employees of their wages." It creates a new "consensus" rule which allows employers to avoid this statute simply by not coming to an identifiable decision. Here the University admitted employees were not subject to withhold-

---

[2] RCW 49.52.050 makes it illegal for an employer "to pay any employee a lower wage than the wage such employer is obligated to pay such employee by any . . . contract." (emphasis added)

ing,[3] but it refused to refund previously withheld wages to those employees, fighting their efforts to recover their wages and adopting policies not to advise prior employees of this change. (FF 19, 20, 21) The decision says these employees, who admittedly had wages wrongly withheld, have no remedy.

The decision took the unprecedented step of granting summary judgment to the University even though (1) the University never sought summary judgment on the grounds stated (thereby denying the class the ability to address the issue), and (2) factual issues remain unresolved. The

---

[3] Those positions include those listed on Ex. 28 (App. A) plus several others the University subsequently added. The University's counsel admitted as a fact to the trial court that "there is no dispute [that] those positions are not covered" and that "withholding of the social security tax was legally erroneous as to those people." RP 710. See also RP 174: "We agree [these positions] were not covered by social security [and] social security should not have been withheld at the time that it was."

class has been denied constitutional due process.

In addition to its extreme legal ramifications (discussed below), this decision has the immediate effect of denying the class any remedy for recovery of their earned wages.[4] The decision means the class (or any employee) has no contract remedy when the University (or any employer) does not pay to them the full wage at the time it was owed. It means that to recover their money under RCW 49.48.010 they must first quit their jobs, a harsh and irrational precondition raising equal protection and due process concerns. *Logan v. Zimmerman*, 455 U.S. at 428-431,

---

[4] It remains undisputed that the class worked for the University for a promised gross wage but were not paid that wage because social security was withheld. It also remains true that these employees were not subject to withholding under the laws and agreements which were in effect throughout the state and applied by every governmental body (including the University) since 1981. *See* fn 1.; *see also* Respondent's Brief p. 4-6, 15-16; FF 11. These employees are entitled to the return of their money.

441-442. Alternatively, they have no recovery under RCW 49.52.050 because of their employer's bureaucratic gridlock or refusal to address the issue (matters over which employees have no control). Even after the employer decides withholding is not proper, the decision says the employees still do not get to recover their improperly withheld wages![5]

This results in gross inequities. The University already refunded withheld wages

---

[5] There may be confusion as to the employees' ability to recover from the IRS. First, this is a wage case, not a social security case. That there may be a collateral source for payment does not diminish the employer's responsibility to rectify what it caused. Second, the IRS regulations place payment responsibility on the employer: "If an employer collects from any employee . . . more than the correct amount of [social security tax]. . . the employer shall repay or reimburse the employee in the amount thereof. . . [.]" 26 CFR § 31.6413(a)-1(b) (1989) emphasis added. The University was told this by the IRS (Ex 36) but refused to do so. Third, because of statutory limitation periods, a substantial majority of the class have no such refund option. The University, on the other hand, has a tolling agreement with the IRS allowing it to recover back to 1985. Fourth, this all assumes employees are aware of this option. But because the University adopted a policy not to inform prior employees of this option, the class has effectively been denied this ability.

to the RA/TAs in 1987-89. It also returned withheld wages to approximately 680 class employees in 1991. (FF 21) Thus, under this decision, certain class employees have been paid full wages while others will not, all at the employer's arbitrary whim. *See Logan*, 455 U.S. at 441-442.

The court's decision also denies funds to the University and the state. The University made matching payments. If the University repaid the class, it would have the right to recover those payments plus its matching payments from the IRS. For the 680 employees it repaid 1991, the University recovered $2.2 million for its own treasury. Ex 39; *See* App. B. (Ex 42 to Ex. 79)) For the RA/TAs, the University recovered over $6.1 million. (Ex. 72 at 5/22/89). The decision unwisely deprives both class employees their wages and the state its tax monies.

B. Failure to Pay Contracted Wage Is a Breach of Contract.

It is respectfully submitted that this decision has rendered wage contracts meaningless by holding that there is no breach of contract when the employer keeps wages from the employee unless the employer has also expressly agreed not to withhold anything, even where the employer has no right to withhold in the first place. This decision says that there is no implied contract term prohibiting an employer from withholding wages (stated differently, there is no implied term compelling the employer to pay the full promised wage). Thus, absent an express term prohibiting withholding (even where there is no right to withhold), there is no breach of contract when the full contracted amount has not been paid.[6]

---

[6] Since there is nothing unique about employment contracts in this respect, this result is applicable to any contract. Thus in any sales

It is not disputed that the class employment was contractual: there was an agreed wage for their performance. The issue was whether an employer is free not to pay the full wage (*i.e.*, withhold wages) and not breach that contract. This court has said yes; the University made no such argument on appeal.

The decision rests on a faulty assumption by stating that the question was whether the contract contained a term prohibiting the University from withholding social security unless authorized. (Op. p. 10-11). That the withholding was for social security is irrelevant. This is a wage recovery case, not a social

---

contract, whether for goods or services, for a stated payment, unless there is an express term prohibiting the buyer from withholding anything from the amount due, the buyer may do so without breaching the contract. Examples could go on endlessly.

security case.[7] The question is whether the class (or any employee) is subject to withholding for anything unless it was authorized by law. This is true whether withholding is for social security, pension fund, parking fee, or coffee fund. The conceded fact is the class was not subject to social security withholding. See fn 3. By withholding anyway their employer paid the class less than they

---

[7] It is submitted that the decision's apparent assumption that the class was subject to social security, and social security withholding, unless it was contractually agreed there would be no withholding, is wrong. As interpreted and applied by the federal government, the state, and all affected agencies (including the University) for over a decade, the Basic Agreement did not extend social security to the class. The University had authority to withhold only if an employee was covered under that Agreement. RCW 41.48.030. Because the class was not included under the Basic Agreement, the University had no right to withhold their wages. Since there was no right to withhold, the University breached its contract by withholding anyway. While the class does not have standing to claim recovery due to any breach of the Basic Agreement (Op. p. 10) because they are not covered by that Agreement, the class does have standing to claim that the University improperly applied the Basic Agreement to them by withholding their wages, again because they are not covered by that Agreement. Standing is conferred where their rights and interests are affected. The rights of the class were affected when the University withheld their wages.

were owed. Paying less than the amount agreed to and owed, we submit, is a breach of contract.

This decision says absent an express term prohibiting an employer (or other contracting party) from doing what it had no right to do in the first place (*i.e.*, withholding wages or payment), there is no breach of contract when payment is withheld. We know of no principle of contract law which requires a term expressly prohibiting unauthorized withholding in order to sue for breach of contract when unauthorized withholding occurs. If an employer is not authorized, by law or agreement to withhold, why is it necessary that there be an additional term prohibiting it from doing what it had no right to do? To do so is redundant and unnecessary. There similarly was no term obligating the University to refrain from withholding wages to support the football team or to pay off

state debt, but if it had done so the employees unquestionably could sue to recover those wages. It is submitted the same result should follow here.

An employment contract "represents a right in the employee to be paid agreed-upon wages for services performed[.]" *U.S. v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990). It seems axiomatic that an employee can sue for breach of contract where the employer withholds wages without right. *Warner v. Channel Chemical Co.*, 121 Wash. 237, 244, 208 P.2d 1104 (1922) (where the employer had no right to reduce wages but did anyway, the employee "had a right to, and did, treat that act as a breach of the [employment] contract."); *HDH Inc. v. Rush Trucking Inc.*, 1992 WL 89632 (Minn. App. 1992) (employer breached by withholding workers compensation from employee not covered by workers compensation). *See also Ebling v. Gove's Cove*, 34

Wn. App. 495, 663 P.2d 132 (1983). The class similarly should be allowed to recover.

It is also submitted that such a term (*i.e.*, prohibiting the withholding of payment unless authorized) exists both expressly and impliedly in every contract. A contract stating a payment amount (*e.g.*, $10/hour) expressly provides that that amount will be paid. Only if there is authorization to pay less is the sum to be reduced. If there is no authority to pay less, the express term stating the amount to be paid governs. It is superfluous under any principle of contract law to require an additional express term obligating the party to refrain from paying a lesser amount. This is consistent with the rule stated in Restatement (Second) Agency § 443.

There is also an implied contract term to perform in good faith, which at minimum

means not withholding or reducing payment (including wages) without a right to do so. *Badgett v. Sec. St. Bk.*, 116 Wn.2d 563, 569, 807 P.2d 536 (1991). Obtaining "the full benefit of performance" is what the class seeks. Withholding payments without right certainly violates this duty. There <u>is</u> an implied term obligating the employer to refrain from withholding wages without authority.

No case has conditioned a breach of contract claim upon presentation of evidence that there was of an express or implied term obligating the party to refrain from doing what he or she had no right to do.[8] The court should reconsider and the

---

[8] As an affirmative defense, the University had the burden of proof to show it had a right to withhold wages. It did not do so.

class allowed to recover for breach of contract.[9]

C. RCW 49.48.48.010 Allows Recovery to the Class.

The decision limits RCW 49.48.010 to recovery of wages only after termination of employment. The class claims are then dismissed in their entirety because they are erroneously described as not involving wages due at the termination of employment. It is submitted that the former is an overly restrictive construction of the statute and the latter is wrong: the class includes members claiming wages due at the termination of employment.[10]

First, to find that the statute allows recovery of wrongfully withheld wages only

---

[9] Inasmuch as contract liability was established on motion for summary judgment, at minimum the case should be remanded to allow the class to proceed to trial on this issue.

[10] The confusion may arise because the University did not raise this defense or make this argument in the court below or on appeal. Thus the class has never had an opportunity to clarify this point.

after termination runs counter to the very purpose of the statute. This statute is remedial and is to be liberally construed to fulfill its purpose. *Gaglidari v. Denny's Restaurants*, 117 Wn.2d 426, 449, 815 P.2d 1362 (1991). The purpose of the statute is to protect employees by insuring they receive their full wages. To hold employees must first quit their job to recover wrongfully withheld wages runs counter to this clear purpose. (Moreover, the class includes terminated employees who fall within the Court's new interpretation of RCW 49.48.010, yet incongruously the Court's decision fails to direct a remand for further proceedings even as to those members.)

The statute does not require this result. The statute as written in 1971 broadly covered "Wages -- Payment -- Collection," and was not limited to termination situations. Ch. 55 Wash. Law 1971

1st Ex. Sess. The first and second paragraphs are unconnected, providing two independent protections for employees: (1) to receive wages promptly upon termination, and (2) to prohibit unauthorized deductions. Reading the statute as a whole, the last paragraph (which refers back to the paragraph on unlawful withholding) expressly refers to "employer or former employer," and "employees or former employees" indicating that both present and past employers are included. Also RCW 49.48.030, enacted as part of the same amendment, refers to recovery actions "against said employer or former employer," again covering present and past employment.

No prior case has hinted that the statute applies only upon termination of em-

ployment.[11] To read such a requirement into the statute (coupled with this decision's employment contract conclusion) effectively denies an employee any remedy to recover wages without quitting his or her job. This is a steep and potentially devastating price to require of an employee in order to recover wages due and one not required on the face of the statute. The Court's construction violates due process and equal protection. *See Logan v. Zimmerman*, 455 U.S. 422 (1982).

This rule also eliminates any meaningful statute of limitations. An employee can work for twenty years, and upon termination the cause of action accrues for wages withheld in year one. There is no

---

[11] Just the opposite. *Cameron v. Neon Sky, Inc.*, 41 Wn. App. 219, 223, 703 P.2d 315 (1985) in stating the statute "makes it unlawful for an employer to withhold or direct any portion of an employee's wages except in three limited circumstances," makes no linkage to termination, and goes on to discuss actions involving "an employee or former employee," expressly encompassing both.

statute of limitations based upon the time of withholding or injury, only termination.[12] The decision also seems to imply that recovery is limited to what was withheld during the last "established pay period,"[13] which if adopted would mean wages withheld during all prior pay periods are lost forever. This cannot be the intent of the remedial statute and should not be engrafted into the text of the statute.

Second, and most critical, even under this decision the claims of the class should not be dismissed. These claims do include class employees who had terminated their employment and had deductions taken

---

[12] This creates a different limitations period from contract claims.

[13] The decision refers to "deductions to wages due at the termination of employment." Op. p. 12. This suggests only deductions made from the last wage check are recoverable, and any prior deductions are not recoverable. This is contrary to the cited cases.

but remaining unpaid at the time of termination.[14]

Most prominent is Pope himself, who terminated employment in June 1989 and claimed wages were wrongfully withheld and remained owed to him at that time. (CP 1, ¶ 1, 21, 24) The fact that there may also be employees in the class who remain employed is not a basis for dismissing the proper and timely claims of the rest of the class. Why should those who meet the decision's interpretation of RCW 49.48.010 be denied recovery? Rather the decision's new interpretation of the statute created

---

[14] The class expressly included former employees who had wages withheld. The trial court's Findings and Conclusions (p1) states the class "consist[s] of present and former employees" (emphasis added). It was originally alleged that the class included "former employees in at least 64 different retirement ineligible job classes" from whom the University withheld and refused to repay wages (Cplt., ¶ 15 (CP 1)). The motion for class certification included all persons "who were employed" by the University. (Plaintiff's Motion for Class Certification, p. 3, CP 13), and class certification order likewise included terminated employees who "were employed" by the University. (Order, CP 19)

an unresolved issue of fact -- to what extent the class consists of terminated employees -- which, because it has never been previously raised, should be resolved by the trial court. At minimum, the case should be remanded for this purpose.

D. Granting Summary Judgment, *Sua Sponte*, Denied the Class Constitutional Due Process.

The decision erroneously leaps from finding, under its new interpretation of RCW 49.48, it was error to grant summary judgment in favor of the class (Op. p. 12) to the conclusion that RCW 49.48 was not violated (Op. p. 16) and directing summary judgment accordingly (Op. p. 19). This conclusion does not automatically follow. The granting of summary judgment, *sua sponte*, without notice to the class of the issue and without allowing the class an opportunity to be heard, is fundamentally unfair, violates CR 56, and denies the class due process. There are material

fact issues (i.e., the class does consist of terminated but unpaid employees) which would preclude summary judgment. This decision arbitrarily denies the class their day in court. At minimum there remain factual issues as to which portion of the class are terminated employees. Rather than dismissing the claims, the matter should be remanded for the purpose of resolving that factual issue.

Summary judgment is almost never granted to the non-moving party on issues or theories that were not raised, briefed, or argued before the trial court. *See Leland v. Frogge*, 71 Wn.2d 197, 201, 427 P.2d 724 (1967) (disapproving of practice except in limited circumstances not applicable here); 4 L. Orland & K. Tegland, *Washington Practice* CR 56(6) at 542-43 (4th ed. 1992). Here, the court raised *sua sponte* the issue of the scope of RCW 49.48 with-

out advance notice and without any opportunity for briefing or argument.[15]

A court must be particularly vigilant, in such circumstances, to avoid compromising a litigant's fundamental due process right to fully and fairly litigate the issues. *DuPont v. Southern Nat'l Bank of Houston*, 771 F.2d 874, 880 (5th Cir. 1985), *cert. denied*, 475 U.S. 1085 (1986). Procedural due process requires, at mini-

---

[15] The Court's decision to grant summary judgment in favor of the University neglects a basic tenet of appellate jurisprudence:

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Hormel v. Helvering, 312 U.S. 552, 556 (1941). This Court has routinely refused to consider theories and arguments raised for the first time on appeal. *See Babcock v. State*, 116 Wn.2d 596, 606, 809 P.2d 143 (1991) (Utter, J.); RAP 12.1(a).

mum, notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *E.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) (notice); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (opportunity to be heard).[16] The leading case of *Fountain v. Filson*, 336 U.S. 681, 683 (1949), sets forth the elementary principle that before summary judgment may be entered in favor of a non-moving party on an issue not briefed, argued, or considered by the trial court, the moving party must at least have an "opportunity to dispute the facts material to that claim."[17]

---

[16] This Court has said that due process requires notice, an opportunity to be heard or defend before a competent tribunal, an opportunity to know the claims of opposing parties and to meet them, and a reasonable time for preparation of one's case. *Cuddy v. State*, 74 Wn.2d 17, 19, 442 P.2d 617 (1968). The class members' property interest in wrongfully withheld wages clearly entitles them to due process protections.

[17] Numerous federal courts of appeal have recognized the fundamental right of a litigant to respond to arguments that may be used to enter judgment against him. *See, e.g., Lindsey v. United*

Here, the issue of the scope of RCW 49.48 was never developed and argued before this court, let alone the trial court. The plaintiff class had no advance notice of the novel theory employed by the court, had no opportunity to present defenses or allege that issues of material fact remained in dispute, and was never presented an opportunity to argue that the University was not entitled to judgment as a matter of law. The record in this case clearly presents issues of material fact

---

States Bureau of Prisons, 736 F.2d 1462, 1463 (11th Cir.), *vacated and remanded on other grounds*, 469 U.S. 1082 (1984); *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982); *E.C. Ernst, Inc. v. General Motors Corp.*, 537 F.2d 105, 109 (5th Cir. 1976). This fundamental right extends to both the opportunity to present factual evidence to a trial court and to argue that judgment as a matter of law is inappropriate. These principles are incorporated into CR 56, which requires that a party threatened by summary judgment be given notice and an opportunity to respond. Only where it is crystal clear that no issue of material fact exists, and that the moving party has had an opportunity to fully and fairly argue the merits of the issue, may an appellate court enter summary judgment for the non-moving party. *See* 10 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 2716 at 660-62 (2d ed. 1983); 6 J. Moore & J. Wicker, *Moore's Federal Practice* ¶ 56.12 at 56-165-71; 56.27[3] at 56-860-61 (1993).

with regard to class members who were terminated and therefore able to maintain viable claims under the court's new interpretation of RCW 49.48. Either the court failed to recognize that fact issues existed or it resolved these issues *sub silentio* in favor of the University, thereby depriving the plaintiff class of any opportunity to argue the merits of its case under the court's new interpretation. The opinion is devoid of any reasoning or analysis that explains the leap from the court's conclusion that summary judgment must be reversed (Op. p. 12) to its conclusion, at the very end of the opinion, that summary judgment should be entered for the University (Op. p. 19). Because material issues of fact remain unresolved, the court's entry of summary judgment in favor of the University was inappropriate

substantively as well as procedurally. *See DuPont*, 771 F.2d at 880 n.4.[18]

If the court adheres to its interpretation of RCW 49.48, the class simply requests that it be allowed to argue the fact issues raised by that interpretation

---

[18] This Court previously recognized the unfairness that may result when summary judgment is entered sua sponte by the court on grounds not considered by the trial court:

> [T]he underlying assumption of the general rule permitting affirmance of the trial court upon a correct, alternative ground not considered by the trial court "is, of course, that the parties had a full and fair opportunity to develop facts relevant to the decision. Where this opportunity has not been available, the proper resolution of the appeal is not affirmance, but remand." *Heirs of Fruge v. Blood Servs.*, 506 F.2d 841, 844 n.2 (5th Cir. 1975). Thus, when the alternative ground for affirming the trial court's order of summary judgment has not been argued and briefed by the parties either before the trial court or the appellate court, caution must be exercised so as not to deny the appellant the right to dispute the facts material to the new theory.

Bernal v. American Honda Motor Co., 87 Wn.2d 406, 414, 553 P.2d 107 (1976) (citations omitted). *Bernal* involved the issue of when an appellate court may affirm a summary judgment on grounds not considered by the trial court. If the right to litigate an issue is crucial in the *Bernal* situation, it must be doubly so where a new theory serves as the basis for summary judgment in favor of a non-moving party, such as the University in this case.

to the trial court. A remand is necessary to narrow the claims to the proper employees, afford due process, and give the class its day in court.

E. Relief Under RCW 49.52.050 Is Appropriate.

The decision finds there was no willful withholding of wages under RCW 49.52.050, for two reasons, both of which, we submit, are premised upon assumptions not supported by the record.

First, relying on *Cameron*, *supra*, it is concluded that the University was deducting an alleged debt (*i.e.* social security) from wages admittedly owed. The problem is there is no "alleged debt." In *Cameron* there was a bona fide dispute as to whether the employee owed the employer money[19] due to overpayment of wages. Here there

---

[19] In *Cameron* the employee was still allowed to recover the disputed wages under RCW 49.48.010, while here the decision deprives the class of that right.

was (and is) no question that the class owed nothing to the University or to social security. Because they were not eligible for a retirement program, the class was not subject to withholding. No one ever disputed that rule at any time throughout the class period.[20] There was no social security "debt".

To say paying the federal government is the same as paying the employees (Op. p. 13-14) begs the question by assuming the employees were covered by social security in the first place. They were not! Taking wages to pay social security is no different than taking wages to build a parking lot. The employees are entitled to the money in hand. Since they have not received the money for their use they have

---

[20] Even if someone had questioned or challenged the coverage rule (which in fact never occurred) such a question of an established and defined rule would not have been meritorious and would not have created a bona fide dispute which would have escaped the statute. *Dept. of Labor and Industry* 67 Wn. App. 24, 36, _____ P.2d _____ (1992).

been "deprived" of those wages. Diverting their money elsewhere without right is a violation of the statute. *Cf. Redfield v. ICNA*, 940 F.2d 542, 548 (9th Cir. 1991) (diverting funds to pay taxes and FICA not meet payment obligations).[21]

The decision also reweighed the evidence to conclude there was no "substantial evidence" to support a finding of wilfulness. Instead, the decision adopts a "consensus" rule, whereby an employer can escape RCW 49.52.050 by not making a discrete decision concerning wage withholding. It is submitted that this "consensus" rule runs counter to the purpose

---

[21] As required (Op. p. 14 fn. 3) the class presented evidence, and the court found as a fact, that the University intentionally withheld the wages and intended to deprive the employee of those monies (FF 22, 24). The University admitted it intentionally withheld the wages and that it did not do so carelessly. (FF 24,25) The University's intent is established by the fact that when it stopped withholding from class employees in January, 1990, because they were not subject to withholding, it took no steps to refund previously withheld wages (but instead has resisted doing so) and affirmatively chose to keep such rights secret from the employees (FF 20).

of the statute, places unwarranted limits on the recovery of wages and permits any corporation to avoid a finding of "wilfulness" to avoid a number of statutory or tort duties. *Compare Empire-Detroit Steel v. OSHRC*, 579 F.2d 378, 384-386 (1978) ("willfulness" requirement satisfied by employer's failure to act with reasonable diligence); *Donovan v. Capital City*, 712 F.2d 1008, 1010 (6th Cir. 1983) (addressing "willful" in corporate context).

First, there is no definition of "consensus." It seems to mean that when a person responsible for paying wages refuses or fails to reach a definite decision, no matter how long, there is no "consensus." This is especially troublesome for large organizations, where "letters, memoranda, notices, and recommendations" can be passed back and forth forever while safety and other violations go unremedied. This "consensus" rule puts employees at

the mercy of the employer's bureaucracy and ingenuity.

Here the rule on wage withholding was established in 1981 and restated in 1983. Despite being repeatedly and consistently informed of the rule, and being fully aware of it (*see* Respondent's Reply Brief 1-12) the University chose to ignore or not fully comply with rule. It offered no excuse why it could not or did not comply with the rule before 1990. That it failed to make a "final decision" for over 6½ years for unexplained reasons should not allow it to escape liability or trigger an appellate court to assume the role of fact finder.

What may not be clear from the record is that there was never any legitimate basis for not reaching "consensus" as to

the core of class employees.[22] No one ever argued or believed that those employees were not excluded from social security under the established coverage rule.[23] The only reason withholding continued as to them was because the University chose not to change its practices, not because of any lack of "consensus." This is what the trial court meant in stating that making no decision was making a decision: while the University procrastinated and ignored the rule, the employees were losing their wages.[24]

---

[22] This core group are those listed on Ex. 28 which the University acknowledged were not subject to withholding. See fn 3.

[23] This contrasts sharply with *Sheriff's Assoc. v. Chelan Co.*, 109 W.2d 282, 302, 745 P.2d 1 (1987) where the testimony of the decision makers was contradictory, thereby creating at "bona fide dispute." No such evidence was presented here: there is nothing in the referenced "letters" etc. showing anyone ever thought the class were within the coverage rule.

[24] Even the decision says a "determination" was made in May, 1989 (Op. 8), withholding continued for 7 more months until January 1990. Still the University refuses to refund any withheld wages.

The trial court weighed all the evidence and found the facts supported a finding of statutory violations. If a new "consensus" rule is to be applied, the case, at minimum, should be remanded for a factual determination as to when a "consensus" was, or should have been, reached as to some or all of the class. Failure to do so again denies the class a right to trial and due process.

Alternatively, this "consensus" rule should be reconsidered as not being determinative here and prevailing law governing the standard of "willfulness" to be applied. There is abundant evidence, which the trial court considered controlling after hearing the witnesses, which show wilful withholding.[25]

---

[25] *See, e.g.*, Ex. 79 p. 240; FF 17; Ex. 11, 12, 79 p. 140-147; FF 22; RP 210; Ex. 16; FF 19; FF 20; FF 21.

III. CONCLUSION

This court is respectfully asked to reconsider the above point and affirm the trial court's judgment for the class. Alternatively, at minimum, the Court should remand for further proceedings including the scope of the class. The Court erred in sue sponte deciding issues and errors not raised or preserved and also in eliminating the rights of all class members because under the Court's decision it eliminated the rights of some to recover.

Dated this 9th day of June, 1993.

HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON

By /s/ Phillip D. Noble
Phillip D. Noble,
WSBA #3530

Attorneys for Respondents/
Cross-Appellants

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RICHARD L. POPE, JR., Respondent, v. UNIVERSITY OF WASHINGTON, Appellant.	)	No. 58938-1
	)	ORDER GRANTING MOTION FOR RECONSIDERATION WITHOUT NEW ARGUMENT

The Court having entered an order changing opinion in the above cause on September 21, 1993,

It is hereby ordered that further reconsideration is denied.

Dated this 21st day of September, 1993.

/s/ James A. Anderson
James A. Anderson
Chief Justice

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RICHARD L. POPE, JR.,	)	
	)	No. 58938-1
Respondent,	)	
	)	
v.	)	ORDER CHANGING
	)	OPINION
UNIVERSITY OF WASHINGTON, an instrumentality of the State of Washington,	)	
	)	
Appellant.	)	

It is hereby ordered that the opinion in the above cause, as the same appears at 121 Wn.2d 479, be changed as follows:

1. A superscript of the number "2" is inserted following the period in the nineteenth line from the top of page 488 and the following footnote is added to the bottom of page 488:

> [2]We do not suggest an employer breaches an employment contract only when he or she violates an express term of the contract; instead, we merely assume an employment contract authorizes the deduction of Social

Security withholding in good faith unless the contract or an implied statutory term specifies otherwise. If an employer made deductions from an employee's wages due to dissatisfaction with the employee's work, for example, it would generally be unnecessary for the employee to show an express contract term prohibiting such deductions.

2. The remaining footnotes in the opinion are renumbered accordingly.

Dated this 21st day of September, 1993.

/s/ James A. Andersen
James A. Anderson
Chief Justice

/s/ Utter, J.
/s/ Brachtenbach, J.
/s/ Durham, J.
/s/ Guy, J.
/s/ Johnson, J.
/s/ Madsen, J.

APPENDIX F

IN THE
SUPREME COURT
OF THE STATE OF WASHINGTON

RICHARD L. POPE, JR., on behalf of himself and the class of all persons similarly situated, Respondent,	**MANDATE**
v.	No. 58938-1
UNIVERSITY OF WASHINGTON, an instrumentality of the State of Washington, Appellant.	King County No. 90-13235-8

The State of Washington to:

The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on May 20, 1993, became the decision terminating review of this Court in the above entitled cause on September 21, 1993. This cause is mandate to the superior court from which the appeal

was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: Costs will be taxed by Supplemental Judgment. Order Granting Motion for Reconsideration Without New Argument was entered herein on September 21, 1993.

[SEAL]

IN TESTIMONY WHEREOF, I have hereunto set my hand affixed the seal of said Court at Olympia, this 13th day of October, 1993.

C. J. MERRITT
C. J. Merritt
Clerk of the Supreme Court,
State of Washington

cc: Mr. Patrick McBride
Hon. Christine Gregoire
Attorney General
Mr. William Collins, Asst.
Mr. Phillip Noble
Reporter of Decisions

APPENDIX G

STATUTES

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant portion of 26 U.S.C. § 3101 provides:

(a) **Old-age, survivors, and disability insurance.** --In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)) --

In cases of wages received during:	**The rate shall be:**
1984, 1985, 1986 or 1987	5.7 percent
1988 or 1989	6.06 percent
1990 or thereafter	6.2 percent.

The relevant portion of 26 U.S.C. § 3121 (a) and (b) provides:

(a) Wages. -- For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than

cash; except that such term shall not include -- [NA] . . .

(b) Employment. -- For purposes of this chapter, the term "employment: means any service, of whatever nature, performed (A) by an employee for the person employing him;, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen or resident of the United States as an employee for an American employer (as defined in subsection (h)), or (C) if

it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section 233 of the Social Security Act; except that such term shall not include --

. . .

(7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned thereby, except that this paragraph shall not apply in the case of --

. . .

(E) service included under an agreement entered into pursuant to section 218 of the Social Security Act;

The relevant portion of 42 U.S.C. § 410(a)(7) provides:

§ 410. Definitions relating to employment

For the purposes of this subchapter --

(a) Employment

The term "employment" means any service performed after 1936 and prior to 1951 which was employment for the purposes of this subchapter under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1950 (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or

aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen or resident of the United States as an employee (i) of an american employer (as defined in subsection (e) of this section), or (ii) of a foreign affiliate (as defined in section 3121(l)(6) of Title 26) of an American employer during any period for which there is in effect an agreement, entered into pursuant to section 3121(l) of Title 26, with respect to such affiliate, or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section 433 of this title; except that, in the case of service performed after 1950, such term shall not include --

. . .

(7) Service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned thereby, except that this paragraph shall not apply in the case of --

(A) service included under an agreement under section 418 of this title,

. . .

The relevant portion of 42 U.S.C. § 418

§ 418. Voluntary agreements for coverage of State and local employees

(a) Purpose of agreement

(1) The Secretary shall, at the request of any State, enter into an agreement with such State for the purpose of extending in insurance system established

by this subchapter to services performed by individuals as employees of such State or any political subdivision thereof. Each such agreement shall contain such provisions, not inconsistent with the provisions of this section, as the State may request.

(2) Notwithstanding section 410(a) of this title, for the purposes of this subchapter the term "employment" includes any service included under an agreement entered into under this section.

. . .

(c) Services covered

(1) An agreement under this section shall be applicable to any one or more coverage groups designated by the State.

. . .

Revised Code of Washington 41.48.040 provides:

(1) Every employee of the state whose services are covered by an agreement entered into under RCW 41.48.030 shall be required to pay for the period of such coverage, into the contribution fund established by RCW 41.48.060, contributions, with respect to wages (as defined in RCW 41.48.020), equal to the amount of employee tax which would be imposed by the federal insurance contributions act if such services constituted employment within the meaning of that act. Such liability shall arise in consideration of the employees' retention in the service of the state, or his entry upon such service, after the enactment of this chapter.

(2) The contribution imposed by this section shall be collected by deducting the amount of the contribution from wages as and when paid, but failure to make such

deduction shall not relieve the employee from liability for such contribution.

(3) If more or less than the correct amount of the contribution imposed by this section is paid or deducted with respect to any remuneration, proper adjustments, or refund if adjustment is impracticable, shall be made, without interest, in such manner and at such times as the state agency shall prescribe.

Revised Code of Washington 41.48.050 provides:

(1) Each political subdivision of the state is hereby authorized to submit for approval by the governor a plan for extending the benefits of title II of the social security act, in conformity with the applicable provisions of such act, to those employees of such political subdivi-

sions who are not covered by an existing pension or retirement system. Each pension or retirement system established by the state or a political subdivision thereof is hereby authorized to submit for approval by the governor a plan for extending the benefits of title II of the social security act, in conformity with applicable provisions of such act, to members of such pension or retirement system. Each such plan and any amendment thereof shall be approved by the governor if he finds that such plan, or such plan as amended, is in conformity with such requirements as are provided in regulations of the governor, except that no such plan shall be approved unless --

. . .

(3)(a) Each political subdivision as to which a plan has been approved under this section shall pay into the contribution fund, with respect to wages (as defined in

RCW 41.48.020), at such time or times as the governor may by regulation prescribe, contributions in the amounts and at the rates specified in the applicable agreement entered into by the governor under RCW 41.48.030.

(b) Each political subdivision required to make payments under paragraph (a) of this subsection is authorized, in consideration of the employee's retention in, or entry upon, employment after enactment of this chapter, to impose upon each of its employees, as to services which are covered by an approved plan, a contribution with respect to his wages (as defined in RCW 41.48.020), not exceeding the amount of employee tax which is imposed by the federal insurance contributions act, and to deduct the amount of such contribution from his wages as and when paid. Contributions so collected shall be paid into the OASI contribution fund in partial

discharge of the liability of such political subdivision or instrumentality under paragraph (a) of this subsection. Failure to deduct such contribution shall not relieve the employee or employer of liability therefor.

Revised Code of Washington 49.48.010 provides:

When any employee shall cease to work for an employer, whether by discharge or by voluntary withdrawal, the wages due him on account of his employment shall be paid to him at the end of the established pay period: Provided, however, that this paragraph shall not apply when workers are engaged in an employment that normally involves working for several employers in the same industry interchangeably, and the several employers or some of them cooper-

ate to establish a plan for the weekly payment of wages at a central place or places and in accordance with a unified schedule of paydays providing for at least one payday each week; but this subsection shall not apply to any such plan until ten days after notice of their intention to set up such a plan shall have been given to the director of labor and industries by the employers who cooperate to establish the plan; and having once been established, no such plan can be abandoned except after notice of their intention to abandon such plan has been given to the director of labor and industries by the employers intending to abandon the plan: Provided further, That the duty to pay an employee forthwith shall not apply if the labor-management agreement under which the employee has been employed provides otherwise.

It shall be unlawful for any employer to withhold or divert any portion of an employee's wages unless the deduction is:

(1) Required by state or federal law; or

(2) Specifically agreed upon orally or in writing by the employee and employer; or

(3) For medical, surgical or hospital care or service, pursuant to any rule or regulation: Provided, however, That the deduction is openly, clearly and in due course recorded in the employer's books and records.

Paragraph three of this section shall not be construed to affect the right of any employer or former employer to sue upon or collect any debt owed to said employer or former employer by his employees or former employees.

APPENDIX H

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

RICHARD L. POPE, JR., on behalf of himself and the class of all persons similarly situated,	NO. 90-2-13235-8
Plaintiffs,	STIPULATION AND ORDER RE: ORDER GRANTING MOTION TO REDEFINE THE CLASS
v.	
UNIVERSITY OF WASHINGTON, an instrumentality of the State of Washington,	
Defendant.	

COME NOW counsel for the parties herein and stipulation and agree as follows:

On July 9, 1993, plaintiff brought on for hearing a Motion to Redefine the Class to Create Special Subclass of Terminated Employees, which motion was granted over the opposition of defendant. In connection with that motion, plaintiff's counsel presented a form of order to implement the court's granting of the motion which was

signed by the Honorable Mary W. Brucker. That form of order was different from the proposed order originally attached to the motion because it did not expressly reference the creation of a subclass. It is agreed and stipulated, without prejudice as to any position regarding the merits of plaintiff's motion, that the form of order entered by the court was in error and should be withdrawn, and that a corrected form of order defining a subclass, as provided in plaintiff's motion, may be entered.

DATED this 12th day of July, 1993.

CHRISTINE O. GREGOIRE
Attorney General
By /s/ Noella A. Rawlings
Noella A. Rawlings
WSBA #11060
Assistant Attorney General
Attorneys for Defendant

HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON
By /s/ Phillip D. Noble
Phillip D. Noble
WSBA #3530
Attorneys for Plaintiff

ORDER

Pursuant to the foregoing stipulation it is hereby

ORDERED that the court's order of July 9, 1993, Granting Motion to Redefine the Class be, and hereby is, withdrawn, and it is further

ORDERED that plaintiff's motion to redefine the class is GRANTED, and it is further

ORDERED that a subclass is created and defined as follows:

> All persons who were employed by the University of Washington in positions not eligible under a state retirement program at any time since March 14, 1983, up to and including February 1, 1991, from whose wages the University of Washington withheld social security contributions and who have terminated their employment with the University of Washington but were not repaid the wages withheld from them, and which are due on account of their employment, at the time of termination.

DATED this 13th day of July, 1993.

/s/ Mary W. Brucker
Judge Mary W. Brucker

Presented by:

HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON

By /s/ Phillip D. Noble
Phillip D. Noble, WSBA #3530
Attorneys for Plaintiff

Approved as to form, notice
of presentation waived:

CHRISTINE O. GREGOIRE
Attorney General

By /s/ Noella A. Rawlings
Noella A. Rawlings, WSBA #11060
Assistant Attorney General
Attorney for Defendants

APPENDIX I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RICHARD L. POPE, JR., Respondent/ Cross-Appellant,	)	No. 58938-1
v.	)	ORDER
UNIVERSITY OF WASHINGTON, Appellant/ Cross-Respondent.	)	

This matter came before Department II of the Court on its October 6, 1993, Motion Calendar on Appellant/Cross-Respondent's motion to quash the trial court's order granting motion to redefine the class and Respondent/Cross-Appellant's motion to allow oral argument. Justice Smith did not sit on this case, Justice Durham sat as Justice Pro Tem. The Court having considered the motions and the files herein;

Now, therefore, it is hereby

ORDERED:

That Appellant/Cross-Respondent's motion to quash the trial court's order granting motion to redefine the class is granted and Respondent/Cross-Appellant's motion to allow oral argument is denied.

DATED at Olympia, Washington this 6th day of October, 1993.

/s/ James A. Andersen
James A. Andersen
Chief Justice

APPENDIX J

EXCERPTS FROM THE DEPOSITION
OF HOWARD COTTRELL

Volume II, p. 239:24 - 241:15

Q. You did make recommendations, for example, concerning Social Security deductions concerning certain faculty groups?

A. I did.

Q. And you also made recommendations with respect to Social Security deductions made for certain graduate student positions back in 1983 and if the faculty positions for whom you made the recommendation to stop Social Security deductions had existed back in 1983, you could have recommended that Social Security deductions be stopped for them at that time, could you not?

A. I could have.

Q. Was there something that you learned between 1983 and 1989 that led to your

making the recommendation in 1989 with respect to those faculty positions?

A. A lot, there were a lot of changes between 1983 and 1989. The 1983 situation came about pure and simple as a desire to increase the takehome pay of the TA's and RA's. The University was in sad financial situation and we couldn't pay them competitive wage and that was one of the ways that was thought we could do it, because they were students, they do pay tuition, they do take classes. They do get grades. Three of the major reasons that you can classify someone as a student. So we thought that that was a fairly open and shut case. It turned out it took four years to prove that but nevertheless the reason we went into it was just that.

Q. Is it also one of the reasons that you made the recommendation for those 12 graduate student positions was because you were directed by the State Employment

Security Department to identify employment positions that were not subject to Social Security? We looked at those exhibits last time.

A. Yes, I know who they are, roughly. I believe that we made it on the basis that we thought those were the best ones to put forward and those were the ones, the majority of them were TA's and RA's and that was the group that we were worried about as far as take-home pay was concerned.

APPENDIX K

MEETING ON SOCIAL SECURITY REFUNDS

August 26, 1987

PRESENT: Howard R. Cottrell, Fred Bailey, Marli Bennett, Frank Mongtomery, Steve Olswang and Bob Worlein

This meeting was held to discuss the possible groups to be included in the social security refund.

Clem Miyayo of the State OASI Office had told Bob that the social security refunds related to employees in the non-retirement group. If this is the case, RA's and TA's as well as residents, senior fellows and other similar groups could be involved.

Steve stated that the exemption was requested for graduate students in such a manner that it would only include RA's and TA's. Therefore, all other academic ap-

pointments are excluded from this ruling, and refunds will be limited to TA/RA appointments only.

cc: Bob Worlein

APPENDIX L

EXCERPTS FROM THE DEPOSITION
OF TALLMAN TRASK

p. 31:12 - 32:14

Q. Well, do you recall having a discussion with Mr. Cottrell in the late 1980s with respect to whether other employee positions should similarly be removed from Social Security because they were not covered by a state retirement system?

A. I have a general recollection of such a conversation.

Q. Was a decision made to do that?

A. No.

Q. Was a decision made not to do that?

A. Yes.

Q. Why was that?

A. Well, I think there were several factors involved. One was the number of people involved was rather small. The process of that approval was quite

tedious, complicated and uncertain. The University had tried for many, many years to get the RA/TA issue resolved the way it finally was, and there was no certainty that the others would be resolved that way, and the number of people involved was small and there was, I guess I would say, no champion for that effort as there had been in the case of the RAs and TAs.

Q. So it was decided to continue to withhold Social Security from those employees?

A. Yes.

Q. Even though they were still not covered by a retirement program?

A. Yes.